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No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	17

CITATIONS

Cases:

Alianza Federal de Mercedes v. *Federal Communications Commission*, 539 F. 2d 732	11
American Airlines v. *Civil Aeronautics Board*, 192 F. 2d 417	11
Bowman Transportation, Inv. v. *Arkansas-Best Freight Systems*, 419 U.S. 281	16
Buckeye Cablevision, Inc. v. *Federal Communications Commission*, 387 F. 2d 220	11
Citizens Communications Center v. *Federal Communications Commission*, 447 F. 2d 1201	15
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402	10
Citizens TV Protest Committee v. *Federal Communications Commission*, 348 F. 2d 56	15
Clarksburg Publishing Co. v. *Federal Communications Commission*, 225 F. 2d 511	15
Columbia Broadcasting System v. *Democratic National Committee*, 412 U.S. 94	13
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134	6, 16
Federal Communications Commission v. *WOKO, Inc.*, 329 U.S. 223	13
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17	16
Federal Trade Commission v. *Morton Salt Co.*, 334 U.S. 37	16
Fidelity Television v. *Federal Communications Commission*, 515 F. 2d 684, certiorari denied, 423 U.S. 926	13
Greater Boston Television Corporation v. *Federal Communications Commission*, 444 F. 2d 841, certiorari denied, 403 U.S. 923	11
Mansfield Journal Co. v. *Federal Communications Commission*, 180 F. 2d 28	15
Massachusetts Bay Telecasters v. *Federal Communications Commission*, 261 F. 2d 55	13
National Broadcasting Co. v. *United States*, 319 U.S. 190	9
Permian Basin Area Rate Cases, 390 U.S. 747	10

Cases—Continued
Pinellas Broadcasting Co. v. *Federal Communications Commission*, 230 F. 2d 204 — Page 15
Public Interest Research Group v. *Federal Communications Commission*, 522 F. 2d 1060 — 14
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367 — 13
Scripps-Howard Radio v. *Federal Communications Commission*, 189 F. 2d 677, certiorari denied, 342 U.S. 830 — 15
Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 — 10
Storer Broadcasting Co. v. *United States*, 240 F. 2d 55 — 9
United States v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 — 13
United States v. *Maher*, 307 U.S. 148 — 11
United States v. *Radio Corporation of America*, 358 U.S. 334 — 9
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 — 8
Statutes and Regulations:
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*:
Section 152(a) — 168
Section 154(i) — 168
Section 154(j) — 168
Section 301 — 169
Section 303(g) — 169
Section 309(a) — 170
Section 309(d)(1) — 170
Section 402(a) — 5
47 C.F.R. § 73.35 — 3
47 C.F.R. § 73.240 — 3
47 C.F.R. § 73.636 — 3
Miscellaneous:
CATV Rules (Docket Nos. 14895 *et al.*): Second Report and Order, 2 FCC 2d 725 — 11
CATV Rules (Docket Nos. 18397 *et al.*): Cable Television Report and Order, 36 FCC 2d 143 — 11
Daytime Skywave Transmission Rules:
Report and Order, 18 Rad. Reg. (P&F) 1845 — 11
Federal Communications Commission Eleventh Annual Report — 8
FM Broadcast Rules:
Second Report, Memorandum Opinion and Order, 40 FCC 720 — 11
Multiple Ownership of Standard Broadcast Stations:
Order 84–A, 8 Fed. Reg. 16065 — 8
Multiple Ownership Rules (Docket No. 8957).
Report and Order, 18 FCC 288 — 8
Multiple Ownership Rules (Docket No. 14711):
Report and Order, 45 FCC 1476 — 8
Multiple Ownership Rules (Docket No. 18110):
First Report and Order, 22 FCC 306, modified, 28 FCC 2d 622 — 8
Further Notice of Proposed Rule Making, 22 FCC 2d 339 — 9

Miscellaneous—Continued
Second Report and Order, 50 FCC 2d 1046, reconsidered, 53 FCC 2d 589 — Page 5
Newspaper Ownership of Radio Stations:
Order No. 79, 6 Fed. Reg. 1580 — 7
Order No. 79–A, 6 Fed. Reg. 3302 — 7
Notice of Dismissal of Proceeding, 9 Fed Reg. 702 — 7
Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 — 12
Report on Chain Broadcasting (Order No. 37, Docket No. 5060) — 8
Telephone Terminal Equipment Rules:
Memorandum Opinion and Order, 59 FCC 2d 88 — 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Communications Commission petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A,[1] pp. 1–60) has not yet been reported. The orders of the Federal Communications Commission (Apps. B and C, pp. 61–158) are reported at 50 FCC 2d 1046 and 53 FCC 2d 589.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1977 (App. D, pp. 159–160). A partial stay of mandate was granted by the court of appeals on April 5, 1977 (App. E, pp. 161–167), and this petition for certiorari is being filed within the time allowed by the court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

[1] The appendices to this petition are set forth under separate cover.

QUESTION PRESENTED

Whether the court of appeals exceeded the proper role of a reviewing court (1) by substituting its judgment for the judgment of the Federal Communications Commission that, in the absence of a showing of public harm, public interest considerations, which warranted the adoption of rules forbidding new broadcast-newspaper combinations in the same community, did not, on balance, warrant across-the-board divestiture of existing, previously approved, combinations, (2) by holding that the Commission could not limit divestiture to combinations which the Commission concluded constituted effective local media monopolies and (3) by requiring the Commission to order across-the-board divestiture of all existing combinations except on individual showings of exceptional circumstances.

STATUTES INVOLVED

Sections 2(a), 4(i), 4(j), 301, 303(g), 309(a) and 309(d)(1) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 152(a), 154(i), 154(j), 301, 303(g), 309(a) and 309(d)(1), are set forth in App. F, pp. 168–170.

STATEMENT

1. This petition seeks review of an opinion (App. A, pp. 1–60) and judgment (App. D. pp. 159–160) invalidating those portions of the so-called multiple ownership rules of the Federal Communications Commission which provide for divestiture by co-located newspaper-broadcast combinations which, in the Commission's view, constitute effective local media monopolies inconsistent with the public interest standard of the Communications Act. The court of appeals has held that the Commission may not confine divestiture to such effective monopoly situations, but must instead adopt a rule requiring the breakup of all co-located newspaper-broadcast combinations, subject to waiver for exceptional cases. The decision of the court, if upheld, would affect more than 50 newspaper-television combinations and more than 120 newspaper-radio combinations in over 130 communities throughout the United States.

2. Until the rules now under review were adopted, the Commission had long encouraged newspaper-broadcast cross-ownership because of the important contribution it believed such owners would make to the development of radio and, later, television broadcasting. For many years, the Commission repeatedly found that licensing broadcast stations to newspaper owners in the same community was in the public interest and otherwise consistent with other agency policies. The instant rulemaking proceeding was initiated in 1970 to determine whether the Commission should continue to sanction such ownership. After a review of all comments submitted and facts of record, the Commission concluded that there were changed circumstances warranting a different policy with respect to newspaper owners applying for new broadcast facilities, but found no such circumstances and no record evidence warranting a new policy requiring across-the-board divestiture of existing newspaper-broadcast combinations. Indeed, the agency found that there were important public interest reasons for grandfathering most existing ownerships.

Thus, by Report and Order, 50 FCC 2d 1046 (App. B, pp. 61–147) the Commission prohibited the establishment of any new co-located newspaper-broadcast combinations, see 47 C.F.R. §§ 73.35(a)(1), 73.240(a)(1), 73.636(a)(1). (App. B. pp. 114–121), and also required divestiture in existing situations where the same party owned, operated, or controlled the only newspaper and the only television station (or, if there was no local television outlet, the only radio station) in a community. All other existing combinations were grandfathered. 47 C.F.R. §§ 73.35(c) and n. 8, 73.240(c) and n. 8, 73.636(c) and n. 8 (*Id.*) [2]

In adopting the above rules, the Commission summarized the record evidence (*Id.*, pp. 67–89), and discussed the various considerations underlying its action, including its legal authority (*Id.*, pp. 63–67), and the policy reasons for adopting its prospec-

[2] However, the prospective rules required that, in any future transactions involving existing combinations, the newspapers and broadcast licenses concerned must be transferred or sold to different parties.

tive rules (*Id.*, pp. 89–93) and for limiting divestiture to situations where the Commission concluded there was an effective local media monopoly (*Id.*, pp. 93–101). The purpose of the prospective rules was to attempt to promote diversity of viewpoints among local mass media. The Commission explained that it was changing its earlier policy of encouraging newspaper-broadcast cross-ownership because the industry had matured and it was no longer necessary to rely on newspaper owners for their experience, resources and willingness to pioneer, which broadcasting once needed. This did not suggest that existing owners were not serving the public interest, but only that the possibility of even a small gain in diversity was worthwhile when it could be achieved without any disruption of existing services (*Id.*, pp. 90–91).

Whether to require divestiture was a very different and difficult problem. First, the record in this lengthy, five-year proceeding did not reveal any specific abuses or evidence of harm to the public arising out of common ownership, let alone any pattern of abuse or harm (*Id.*, pp. 93 n. 26, 94 n. 27, 100, 104). Second, there was, of course, no guarantee that Commission action would increase diversity (*Id.*, pp. 91, 93). Nevertheless, after considering the views and comments of all the parties, the Commission's judgment was that, in communities where it concluded that there was an effective monopoly over local mass media, there was also likely to be a significant absence of competition and diversity, which *prima facie* outweighed other policy considerations, so that divestiture, although a severe remedy, was warranted (*Id.*, pp. 95–99).

In those communities where there was no newspaper-broadcast monopoly, however, the Commission concluded that the potential harm from divestiture outweighed "a mere hoped for gain in diversity" (*Id.*, p. 93). In the Commission's view, "stability and continuity do serve important public purposes" (*Id.*). Although divestiture might increase diversity, it might also disrupt existing operations and unnecessarily deprive the public of licensees who had served it long and well. On balance,

therefore, the Commission determined that, in the absence of any showing of injury to the public interest,[3] across-the-board separation of newspaper-broadcast combinations was an unwise and unnecessary remedy (*Id.*, pp. 93–96). Upon reconsideration, 53 FCC 2d 589 (App. C, pp. 148–158), the Commission reaffirmed its previous order in all pertinent respects.

3. Several parties sought appellate review pursuant to 47 U.S.C. § 402(a). The court of appeals affirmed the Commission's prospective rules, holding that a legislative type policy judgment intended to increase diversity was not irrational even though its benefits were speculative (App. A, pp. 18, 23).

The court vacated, however, the rules requiring divestiture in effective monopoly situations, as well as the grandfathering of other existing combinations. The court held that the Commission had erred because, once having attempted to promote diversity through its prospective rules, it had not adopted an overall and virtually irrebutable presumption, in connection with its retroactive rules, that "cross-owned stations do not serve the public interest" (*Id.*, p. 51). The court held that this presumption was "compelled," not discretionary, and was not overcome by the other policies advanced by the Commission, and that, therefore, a rule of across-the-board divestiture by co-located newspaper-broadcast combinations was required (App. E, pp. 166–167; App. A, pp. 52–60).

The court also found that the Commission was arbitrary and capricious in distinguishing, for the purpose of its divestiture rules, between communities where the Commission concluded that broadcast combinations had an effective monopoly over local mass media, and other communities where such combinations faced competition. In the court's view, it was irrational for the Commission to conclude that the existence of an effec-

[3] The Commission explicitly recognized that "it [was] not necessary to have proof of abuses" before it could require divestiture (App. B, p. 95 n. 29). The absence of such abuses, however, was a relevant factor in balancing the various competing policy considerations. Had the record revealed evidence of misuse or harm arising from cross-ownership, the Commission might have ordered more divestiture (*Id.*, p. 104).

233-646—77——2

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tive monopoly should control (App. A, pp. 58–59). Thus, in order "that everyone would be equally treated," the court ordered the Commission to adopt a rule, subject to waiver only in exceptional circumstances, requiring across-the-board divestiture (App. E, p. 167; see also App. A, p. 60).[4]

REASONS FOR GRANTING THE WRIT

The Communications Act of 1934, as amended, charges the Commission with the function of regulating broadcasting to serve the "public interest, convenience and necessity," 47 U.S.C. §§ 301, 303, 309(a) (App. F. pp. 169–170). This is a broad mandate which Congress directed the Commission to carry out in light of changing conditions. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). In exercising that function, the Commission has long attached importance to the policy of diversification of broadcast ownership in the belief that this is likely to contribute to a diversity of viewpoints. The policy favoring diversification, however, has not stood in the way of first encouraging newspaper-broadcast cross-ownership, and then repeatedly finding our many years that existing newspaper-broadcast cross-ownerships were in the public interest. The prospective rule adopted by the Commission, prohibiting such combinations in the future, reflected a change in the industry's maturity which led the Commission to conclude that, in the interests of seeking diversity, it was no longer appropriate to rely upon newspaper owners as an important source of qualified new licensees. On the other hand, there was no evidence of changed circumstances or any pattern of conduct injurious to the public interest which affected the

[4] On April 5, 1977, the court of appeals granted a partial stay of its mandate, but only if the Commission filed a petition for a write of certiorari within seventeen days thereafter (App. E, pp. 161–167). The court stayed that part of its order which vacated the Commission's grandfather rule (and neccessarily related matters) and which required the Commission to adopt, instead, a rule ordering divestiture of all co-located newspaper-broadcast combinations. The court did not stay, however, its affirmance of the Commission's prospective rules, or the court's vacation of the Commission's limited divestiture rule.

value of the continuity of meritorious service provided by existing newspaper-broadcast ownerships. Disruption of that service, where it existed, therefore, was unnecessary and undesirable except where there was a real likelihood that the paucity of owners in a community could adversely affect diversity in that community. But the decision of the court below would require the Commission drastically to change its long-standing policies concerning newspaper-broadcast cross-ownerships in the absence of any changed circumstances, in the absence of any record evidence of harm arising out of such ownerships, and without any regard for the Commission's consistent and contrary interpretation of public policy and the Communications Act.

The decision of the court below raises important issues as to the proper role of a court in reviewing agency action which warrant Supreme Court review. The court below has substituted its judgment for that of the Commission on matters of public policy; it has improperly held that an agency may not weigh and apply standards in a different manner when it is acting retroactively than when it is acting prospectively; it has attempted to create a virtually irrebuttable presumption in favor of one important policy which would deprive the agency of the discretion to balance various components under its public interest mandate; and it has improperly usurped an agency function by directing the remedy the agency must adopt.

1. The effect of the decision is to deny the Commission the discretion to balance competing policy considerations so as to reach a result different from that preferred by the court. Moreover, the court's result is inconsistent with the approach the Commission has followed for more than thirty years in fashioning its ownership rules, and in repeatedly finding that existing newspaper-broadcast cross-ownerships have operated in the public interest.[5]

[5] Newspaper owners have never been considered disqualified to hold broadcast licenses. In the 1940's the Commission decided to prevent undue concentration of control by newspaper-broadcast cross-owners on a case-by-case basis rather than by rule. *Newspaper Ownership of Radio Stations*, 6 Fed. Reg. 1508, 3302 (1940), 9 Fed. Reg. 702 (1944).

These rules have codified a Commission policy in favor of diversified ownership of broadcast media. However, the Commission has always taken into account other considerations too, particulary the need to avoid unnecessary disruption of existing services upon which the public has become accustomed to rely. Generally, therefore, these ownership rules have only applied prospectively, with little or no divestiture required.[6]

When the 1953 ownership rules were judicially challenged, this Court upheld the Commission's rulemaking authority to place numerical limitations on the number of commonly owned stations in the same service. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). On remand to the District of Columbia Circuit, the specific limits established by

[6] The Commission's chain broadcasting regulations, promulgated in 1941, generally grandfathered ownership by radio networks of individual stations. The Commission stated that it might have acted differently if this question had arisen before such ownerships had actually come into being. Under the circumstances, however, it ordered divestiture only where two AM stations were licensed to the same network in the same area, or where the available facilities were so few or so unequal that the network had essentially no competition. *Report on Chain Broadcasting* (Order No. 37, Docket No. 5060) (1941). When, in 1953, the Commission limited to seven, seven, and five, respectively, the number of AM, FM and TV stations which could be under common control, it deliberately set these limits at a level that would not require extensive divestiture because it believed this would be "unduly disruptive." *Multiple Ownership Rules* (Docket No. 8957), 18 FCC 288, 292. In the few instances when the limits were exceeded, divestiture was dealt with case by case. *Id.* at 295.

When the Commission first adopted rules which prohibited a single party from owning two or more AM radio broadcast stations in the same area, *Multiple Ownership of Standard Broadcast Stations*, 8 Fed. Reg. 16065 (1943), approximately 20 existing combinations were required to divest on a case-by-case basis, *FCC Eleventh Annual Report* (1946), p. 12. However, in 1964, when the Commission amended its rules to reflect stricter and more precise stanadrds for determining prohibited overlap (AM, FM or TV), no divestiture was required of the numerous existing combinations. *Multiple Ownership Rules* (Docket No. 14711), 45 FCC 1476. Nor did the Commission require divestiture when, in 1970, it adopted rules prohibiting common ownership of television and radio stations in the same market. *Multiple Ownership Rules* (Docket No. 18110), 22 FCC 2d 306, as modified 28 FCC 2d 662.

the Commission were sustained on the ground that they were based on the Commission's experience, "coupled with a design to avoid undue disruption of existing service." *Storer Broadcasting Co.* v. *United States*, 240 F.2d 55, 56 and n. 3. See also *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 206–207 (1943) where this Court in affirming the chain broadcasting regulations, expressly noted the Commission's reluctance to order more extensive divestiture.

After many years of encouraging common ownership of newspaper-broadcast stations in the same community, the Commission, in 1970, initiated the rulemaking proceeding reviewed below to consider, among other things, whether changed circumstances warranted either a prospective ban or the divestiture of existing co-located newspaper-broadcast combinations. Further Notice of Proposed Rulemaking, 22 FCC 2d 339, 346. The Commission was interested in determining whether either of these courses of action was necessary to promote diversity or was otherwise required by the public interest, but at the same time it expressed concern about the disruptive effects of divestiture. *Id.* at 348. This concern took on added significance when the record below revealed no evidence of specific abuses or public interest harm arising from newspaper-broadcast cross-ownerships, let alone a pattern of abuse or harm warranting across-the-board divestiture (App. B, pp. 93 n. 26, 94n. 27, 100, 104). The Commission thus had to decide whether a policy in favor of diversification should now be treated as controlling, or whether other competing policies, most notably that of avoiding disruption, should outweigh the diversification policy under certain circumstances (Id. p. 93).

In evaluating what steps should be taken in regard to existing cross-owned combinations, the Commission fashioned a divestiture rule reflecting this Court's observation that the statutory public interest standard might not be met when "the publisher of the sole newspaper in an area applie[d] for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communications." *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351–352 (1959). Thus, the

Commission's rule required divestiture of all newspaper-broadcast combinations which, in the agency's view, had an effective monopoly over local mass media.[7]

The court below conceded that, in fashioning this divestiture rule in the absence of any evidence of abuses, the "Commission necessarily had to rely primarily on policy, not factual considerations" (App. A, pp. 37–38). However, rather than give deference to a decision based upon various competing public policy judgments, "an area where administrative judgments are entitled to the greatest amount of weight by appellate courts," *SEC* v. *Chenery Corp.* 332 U.S. 194, 209 (1946), the court below approached the same policy considerations differently to reach a result which it preferred.

This was improper, for it is well established that a reviewing court is not "empowered to substitute its judgment for that of the agency." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System,* 419 U.S. 281, 285 (1974), quoting from *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971). It is the agency which is charged with assessing the relevant public interest, "both existing and foreseeable," and the court does not substitute the Commission's balance with "one more nearly to its liking." *Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968). The court of appeals thus exceeded the proper role of a reviewing court vis-a-vis administrative agencies.[8]

The Commission was clearly acting properly when it decided that a retroactive application of policy raised different considerations than when it applied a policy only prospectively.

[7] The divestiture rule for effective monopolies merely particularized the Commission's conception of the public interest from a purely structural perspective. Newspaper-broadcast combinations unaffected by this rule were permitted to continue. However, the Commission retained its long-standing *ad hoc* policy that a showing of specific abuses arising out of the cross-ownership combination could result in a forfeiture of the broadcast license (App. B, pp. 103–104 n. 49).

[8] The court below made it clear that it did not rest its holding in this case on antitrust principles (App. A, p. 57, n. 170). This is not, therefore, an antitrust case in which a court has its own expertise, but rather, it involves issues of communications policy where the court may not substitute its judgment for that of the agency.

See *American Airlines* v. *Civil Aeronautics Board,* 192 F. 2d 417, 420 (D.C. Cir. 1951). It is this distinction which allows the agency the discretion to grandfather established service in the interests of preserving that service to the public. See *Buckeye Cablevision* v. *FCC,* 387 F. 2d 220, 227–228 (D.C. Cir. 1967), citing *United States* v. *Maher,* 307 U.S. 148 (1939).[9] In limiting divestiture to effective monopoly situations, the Commission decided that an attempt to promote diversity in non-monopoly situations did not outweigh the likelihood of harm occasioned by the disruption of existing services (App. B, p. 93).[10] The court of appeals did not disagree that this was a relevant consideration. Rather, the court, in its attempt to promote diversity, tried to leave room for the continuing importance of the factor of minimizing disruption by asserting that "the new owners will become the beneficiaries of any unofficial policy of continuity" (App. A, p. 54). The Commission might have adopted what could be described as a one-time upheaval approach, but that did not afford the court the au-

[9] In addition to its action in fashioning its ownership rules, the Commission has generally disfavored the retroactive application of new requirements. See, *e.g., FM Broadcast Rules,* 40 FCC 720, 725–26 (1962) (existing "supermaximum" FM stations grandfathered); *Daytime Skywave Transmission Rules,* 18 Rad. Reg. (P&F) 1845, 1854 (1959) (existing station interference grandfathered); and *CATV Rules,* 2 FCC 2d 725, 785 (1966) and 36 FCC 2d 143 (1972) (existing CATV signals grandfathered). In all of these cases, the Commission's purpose was to avoid disruption of established service. The 1966 cable grandfathering was upheld in the *Buckeye Cablevision* case, *supra.* See also *Telephone Terminal Equipment Rules,* 59 FCC 2d 83 (1976) (certain types of terminal equipment grandfathered under registration program).

[10] Although the Communications Act does not afford the same degree of security found in other laws, the court of appeals has warned that the Commission may not simply disregard "legitimate renewal expectancies implicit in the structure of the Act." *Greater Boston Television Corporation* v. *FCC,* 444 F. 2d 841, 854 (1970), *cert. denied,* 403 U.S. 923 (1971). See *Alianza Federal de Mercedes* v. *FCC,* 539 F. 2d 732, 736 (1976). The Commission's concern for disrupting existing service in this rulemaking proceeding went beyond, of course, any private interests of established licensees; it also focused upon the interruption of service to the viewing and listening public (App. B, pp. 93, 95).

thority to impose a balance more nearly to its liking. *Permian Basin Area Rate Cases, supra.*[11]

Interference with the Commission's rulemaking authority is sharply illustrated by the court's vacation of those rules which required divestiture of commonly owned newspaper-broadcast interests in a market not served by any other independently owned local newspaper or broadcast facility. The court took the view that in such monopoly markets there may be no less diversity than in larger markets with more competing voices (App. A, p. 59). In other words, the court states that the Commission might have considered adding additional frequencies to these markets, rather than requiring divestiture; it is the larger markets, the court concluded, in which divestiture "may be more useful" (App. A, p. 59). This is not only fundamentally inconsistent with the court's own presumption that additional voices promote diversity, but totally at odds with the court's expression on other occasions that it is the smaller, rather than larger, markets which probably suffer from a lack of diversity.

[11] The court similarly decided to balance differently other policies advanced by the Commission disfavoring divestiture. The Commission expressed concern that the great demand for equity capital to finance divestiture transactions would set in motion a chain of events with a resulting reduction in working capital and profit accumulation otherwise available for quality programming (App. B, pp. 83, 93). The court, while apparently not disagreeing that this was a relevant concern, relegated it to "lesser" importance because this same undesirable effect might also occur when the Commission permitted voluntary transfers to new owners (App. A, pp. 56–57).

The court also dismissed the undesirable effect the Commission attached to the possibility that divestiture would risk the loss of owners who participated in the daily operations of their stations, a factor of substantial importance in comparative proceedings between applicants for new facilities. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395–396. As the court recognized, however, three quarters of existing combinations are locally owned (App. A, pp. 52–53). Although local ownership without any participation in the operation of a station is given no credit in a comparative proceeding, it was not unreasonable for the Commission in a policy making context to take into account the intangible benefits of local ownership, a factor of even some importance in a comparative proceeding. 1 FCC 2d, *supra*. The court, however, preferred to speculate that local entrepreneurs would find broadcasting an attractive investment, and that therefore, there would be no loss of local ownership (App. A, p. 53).

See *Greater Boston Television Corporation* v. *FCC, supra*, 444 F. 2d at 859–860; *Massachusetts Bay Telecasters* v. *FCC*, 261 F. 2d 55, 64–65, n. 24 (D.C. Cir. 1958); *Fidelity Television, Inc.* v. *FCC*, 515 F. 2d 684, 701, (D.C. Cir. 1975) *cert. denied*, 423 U.S. 926 (1975).

The decision of the court strikes at the very heart of the discretion Congress confided to the Commission, not the courts, to be satisfied that the public interest will be served, see *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). An agency's function is not merely to appraise facts and draw inferences, but also to bring its expert judgment to bear on a problem and to determine "from its analysis of the total situation on which side of the controversy the public interest lies." *U.S.* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945). This Court should review the far-reaching interference with the administrative process by the court below.

2. In addition to substituting its judgment for that of the Commission, the court below has now elevated what has heretofore been considered one important component of the public interest standard into binding law. The court holds that because of First Amendment considerations cross-ownership must be presumed to be contrary to the public interest standard of the Communications Act and that in this proceeding, the presumption must be given "controlling weight" over all other public interest policy factors (App. A, pp. 56–57; App. E, pp. 166–167). In reaching this conclusion, the court has failed to observe the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1967). Whether there are such compelling reasons, however, must be determined by a careful evaluation of the Commission's reasoning in light of policies embodied by Congress in the public interest standard of the Communications Act. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121–122 (1972).

The diversification policy adopted by the Commission more than thirty years ago was drawn from both the First Amend-

ment and the antitrust laws. There is no dispute between the court and the Commission that the public interest standard invites reference to First Amendment principles, *CBS* v. *DNC*, *supra*, 412 U.S. at 122, and antitrust policies, *United States* v. *Radio Corporation of America*, *supra*, 358 U.S. at 351. However, although the Commission, with judicial approval, has always emphasized the importance of diversification, neither the Commission nor the courts, including this Court, have ever suggested that the First Amendment compels what has now been declared a virtually irrebuttable presumption against cross-ownership.

The court of appeals now has required the Commission to adopt this controlling presumption because the court is of the view that the Communications Act, the First Amendment, and the long-standing importance of the Commission's diversification policy compelled the presumption that cross-owned stations do not serve the public interest (App. A, p. 51). There is nothing in the Communications Act or its legislative history, however, which mandates this sweeping conclusion or any other one concerning cross-ownership different from that reached by the Commission. Congress chose to leave such questions with the Commission. *CBS* v. *DNC*, *supra*, 412 U.S. at 122. When there have been doubts as to the wisdom of mandating rather than allowing promotion of First Amendment principles, the courts have not imposed such an "inflexible response as a matter of constitutional law." *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975) (footnote omitted), *cert. denied*, 424 U.S. 965 (1976). See also *CBS* v. *DNC*, *supra*. The court of appeals not only failed to give proper deference to the Commission's judgment on this matter, but its declaration that diversification must be given "controlling" weight in this rulemaking proceeding is entirely inconsistent with the court's own past recognition of the Commission's discretion in this area.[12]

[12] Contrary to its holding concerning diversity, the court below recognized that antitrust policy is only one component of the public interest standard, and that the Commission had discretion not to give it *prima facie* effect (App. A, p. 57, n. 107).

For example, the court below consistently has stated only that "(d)iversification is a factor properly to be weighed and balanced with other important factors." *Citizens Communications Center* v. *FCC*, 447 F. 2d 1201, 1214, n. 36 (D.C. Cir. 1971). See also, *Fidelity Television*, *supra*, 515 F. 2d at 709. Diversification was never presumed, either by the Commission or the court, to have "controlling" weight over other policies. Instead the court previously has made clear that it does not intend to "impinge at all upon the Commission's substantive discretion in weighing factors and granting licenses. . . ." *Citizens*, *supra* at n. 33.

The application of this general rule of statutory construction is as appropriate in the context of the multiple ownership rulemaking proceeding as it is in the context of an adjudicatory proceeding.[13] And yet, the decision of the court profoundly deprives the Commission of this same substantive discretion to give meaning to the public interest, convenience and necessity in a rulemaking proceeding. We submit that this fundamental departure from prior statutory construction raises a fundamental issue which should be reviewed by this Court.

2. The decision below also raises a significant issue concerning the court of appeals' power to direct a particular remedy rather than to order a remand of the proceeding to the agency for reconsideration in light of legal errors the court believed to exist. The court of appeals found that the Commission had committed error in insisting that before it could require divestiture of newspaper-broadcast combinations, it had to find evidence of abuses

[13] See, e.g., *Citizens TV Protest Comm.* v. *FCC*, 348 F.2d 56 (D.C. Cir. 1965); *Clarksburg Publishing Co.* v. *FCC*, 225 F.2d 511, 518–519 (D.C. Cir. 1955); *Mansfield Journal Co.* v. *FCC* 180 F.2d 28, 35 (D.C. Cir. 1950); *Pinellas Broadcasting Co.* v. *FCC*, 230 F.2d 204, 208–209 and n.6 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007 (1956); *Scripps-Howard Radio* v. *FCC*, 189 F.2d 677, 683 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 830 (1951).

(App. A, p. 50; App. E, p. 165).[14] The court also believed that the Commission had failed to explain adequately why it did not adopt the presumption that cross-ownership was contrary to the public interest (App. A, p. 52). However, rather than order a remand to the Commission for reconsideration, the court ordered the Commission to adopt a rule requiring, in effect, across-the-board divestiture (App. A, p. 60; App. E, p. 167).

The court below has violated the guiding principle that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952), citing *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 and *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948). On remand, the Commission might have formulated a different rule or decided that a rule was inappropriate in light of the appellate court's legal interpretations. However, when the court decreed that the Commission must adopt a rule requiring divestiture of all co-located, cross-owned newspaper-broadcast combinations, "it usurped an administrative function." *FPC* v. *Idaho, supra.* We submit that this question is one of fundamental importance which also warrants review by this Court.

[14] As previously indicated, n. 3, *supra*, the Commission explicitly recognized that "it was not necessary to have proof of abuses" before it could require divestiture. (App. B, p. 95 n. 29). The court of appeals was thus mistaken when it described the Commission as having believed that it was required to find actual evidence of abuse before it could order divestiture (App. E, p. 165; App. A, p. 50). But even if the court had been correct in its description, and even if this had constituted error by the Commission, the proper course would have been to remand the proceeding to afford the Commission an opportunity to determine whether, in light of this assumed error, it would have formulated a different rule. The court, however, did not do this. Instead, it proceeded to substitute its own policy judgment in favor of divestiture for that of the Commission.

CONCLUSION

The decision below is contrary to established precedent on questions of basic importance to the administration of the Communications Act of 1934 and to administrative law generally. It goes to the essential relationship between agencies and reviewing courts. It is respectfully submitted that the petition for certiorari should be granted.

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76-1471

No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., RESPONDENTS

PETITIONER'S APPENDIX

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TABLE OF CONTENTS

	Page
Appendix A, Opinion of the United States Court of Appeals for the District of Columbia Circuit	1
Appendix B, Second Report and Order of the Federal Communications Commission	61
Appendix C, Memorandum Opinion and Order (Reconsideration) of the Federal Communications Commission	148
Appendix D, Judgment of the United States Court of Appeals for the District of Columbia Circuit	159
Appendix E, Opinion of the United States Court of Appeals for the District of Columbia Circuit on Motion for Stay of Mandate	161
Appendix F, Federal Communications Act of 1934, as amended, 47 U.S.C.:	
§ 151 et seq	168
§ 2a	168
§ 4i	168
§ 4j	168
§ 301	169
§ 303	169
§ 309	170

Appendix A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1064

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENT

ELYRIA-LORAIN BROADCASTING CO.,
WEEU BROADCASTING COMPANY,
WHAS, INC.,
THE HEARST CORPORATION,
THE WASHINGTON POST CO., ET AL.,
BELO BROADCASTING CORPORATION, ET AL.,
SCRIPPS-HOWARD BROADCASTING CO.,
AMERICAN NEWSPAPER PUB. ASSOCIATION,
GENERAL ELECTRIC BROADCASTING CO., INC.,
FORWARD COMMUNICATIONS CORP., ET AL.,
AMERICAN BROADCASTING CO., INC.,
LEE ENTERPRISE, INC., ET AL.,
ILLINOIS BROADCASTING CO., INC., ET AL.,
HOUSTON POST CO., ET AL.,
LOUISIANA TELEVISION BROADCASTING CORP.,
KUTV, INC.,
POST COMPANY,
KNUJ, INC.,
MICKELSON MEDIA, INC.,
CHRONICLE PUBLISHING CO.,
CHRONICLE BROADCASTING CO.,
BUFFALO EVENING NEWS, INC.,
WBEN, INC.,
KSL, INC., INTERVENORS

No. 75-1152

OWOSSO BROADCASTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1289

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA, RESPONDENT
KSL, INC., INTERVENOR

No. 75-1379

WJAG, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
WHAS, INC.,
LOUISIANA TELEVISION BROADCASTING CORP., INTERVENORS

No. 75-1386

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1387

DAILY TELEGRAPH PRINTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
WHAS, INC.,
LOUISIANA TELEVISION BROADCASTING CORPORATION
KSL, INC., INTERVENORS

No. 75-1388

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1567

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1614

THE BROCKWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1618

GRAY COMMUNICATIONS SYSTEMS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

Petitions for Review of an Order of the Federal Communications Commission

---

Argued September 17, 1976

Decided March 1, 1977

Frank W. Lloyd, III, with whom *Charles M. Firestone* and *Henry Geller*, were on the brief for petitioner in No. 75-1064.

Thomas H. Wall, with whom *Suzanne Meyer*, *John H. Marple*, *B. Dwight Perry* and *Alan C. Campbell*, were on the brief for petitioners in No. 75-1263 and 75-1387.

Lee Loevinger, *Robert R. Bruce*, *James H. Sneed* and *Jonathan S. Kahan*, were on the brief for petitioner in No. 75-1289. *Martin Michaelson*, also entered an appearance for petitioner in No. 75-1289.

Aloysius B. McCabe, with whom *Michael Yourshaw* and *Arthur B. Hanson*, were on the brief for petitioner in No. 75-1567 and intervenor American Newspaper Publishers Association in 75-1064.

John P. Southmayd, with whom *Richard R. Zaragoza*, was on the brief for petitioner in No. 75-1614.

Robert B. Nicholson, Attorney, Department of Justice, with whom *Barry Grossman*, Attorney, Department of Justice, was on the brief for respondent, United States of America.

Werner K. Hartenberger, Counsel, Federal Communications Commission, for respondent, Federal Communications Commission. *Ashton R. Hardy*, General Counsel, Federal Communications Commission, *Daniel M. Armstrong*, Associate General Counsel, *Charles H. Bell, Jr.*, *Willard R. Nichols* and *Sheldon M. Guttmann*, Counsel, Federal Communications Commission, were on the brief for respondent, Federal Communications Commission. *Joseph A. Marino*, *Gregory Christopher* and *Stephen A. Sharp*, Attorneys, Federal Communications Commission also entered appearances for respondent Federal Communications Commission.

Ernest W. Jennes, with whom *Russell H. Carpenter, Jr.*, was on the brief for intervenors The Washington Post Company and Post-Newsweek Stations, Capitol Area Inc., *Nicholas W. Fels*, also entered an appearance for intervenors The Washington Post Co., et al.

William J. Dempsey, *Frederick H. Walton, Jr.*, and *Christopher J. Reynolds* were on the brief for Intervenor Belo Broadcasting Corporation.

Paul Dobin, was on the brief for intervenor Louisiana Television Broadcasting Corporation.

James E. Greeley and *Lawrence J. Bernard, Jr.*, were on the brief for petitioner in No. 75-1152.

Richard Hildreth, was on the brief for petitioner in No. 75-1379.

R. Russell Eagan and *Robert A. Beizer*, were on the brief for petitioner in No. 75-1618.

Lee M. Mitchell, was on the brief for intervenor WHAS, Inc., in Nos. 75-1064, 75-1379 and 75-1387.

Glen A. Wilkinson, *Robert W. Barker* and *William R. Loftus*, were on the brief for intervenor KSL, Inc.

John H. Widlen and *Dennis F. Begley*, were on the brief for intervenors KNUJ, Inc., Michelson Media and The Post Company.

Louis J. Sirico, Jr., and *Martin H. Rogol*, filed a brief on behalf of Public Interest Research Group, et al as *amici curiae*.

Marcus Cohn, *Paul Dobin* and *Martin J. Gaynes*, entered appearances for intervenors Elyria-Lorain Broadcasting Co and WEEU Broadcasting Co.

James P. Holden, entered an appearance for petitioner in Nos. 75-1686 and 75-1688.

William Dempsey and *Christopher Reynolds*, entered appearances for intervenors The Hearst Corporation and Scripps-Howard Broadcasting Co., et al.

James A. McKenna, Jr., *Thomas N. Frohock* and *Steven A. Lerman*, entered appearances for intervenors General Electric Broadcasting Co., Inc., Forward Communications Corporation, et al and American Broadcasting Companies, Inc.

Peter D. O'Connell, entered an appearance for intervenors Lee Enterprises, Inc., et al.

William M. Barnard, entered an appearance for intervenors Houston Post Company, et al.

William J. Potts, entered an appearance for intervenor KUTV, Inc.

Frank U. Fletcher, *Robert L. Heald* and *Marvin Rosenberg*, also entered appearance for intervenors The Chronicle Publishing Company, et al

Before: BAZELON, *Chief Judge*, WRIGHT and ROBINSON, *Circuit Judges*

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *Chief Judge*: At issue are Federal Communications Commission regulations dealing with one aspect of media ownership concentration: newspaper-broadcast station cross-ownership. *Second Report and Order* (*Order*), 50 F.C.C. 2d 1046 (1974), *reconsidered* 53 F.C.C. 2d 589 (1975)[1] In 1970 the Commission proposed rules entirely eliminating newspaper-broadcast affiliation in a common city of operation. Docket 18110, 22 F.C.C. 2d 349 (1970). Following a lengthy rulemaking proceeding, the Commission issued the more limited ban challenged here by the National Citizens Committee for Broadcasting, the Justice Department and various media interests.[2] In relevant part, the rules:[3]

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[1] In addition to the newspaper-television regulations, 47 C.F.R. § 73.636(c), which form the heart of this case, the Commission also promulgated similar regulations regarding newspaper-radio station combinations. *But see* note 18, *infra*, 47 C.F.R. §§ 73.35(c), 73.240(c). Two of the petitioners, WJAG, Incorporated and Owosso Broadcasting, Inc., operate radio stations and presumably challenge those regulations. Their briefs, however, merely incorporate by reference briefs filed by other parties which do not distinguish between the radio and television regulations. Our discussion, therefore, will pertain equally to both sets of regulations.

The *First Report and Order* in Docket 18110, 22 F.C.C. 2d 306 (1970), proscribed the formation of new AM-FM combinations serving the same market and placed restrictions on the transfer of existing combinations. These regulations are not at issue in this appeal.

[2] In addition to WJAG, Inc., and Owosso, briefs were filed by the following parties representaing media interest: Daily Telegraph Printing Company (Daily Telegraph), Gray Communications Systems, Inc. (Gray), the Brockway Company (Brockway), National Association of Broadcasters (NAB), and American Newspaper Publishers Association (ANPA).

[3] The rules are codified at 47 C.F.R. §§ 73.35, 73.240, 73.636.

1) forbid the future formation or transfer of co-located newspaper-broadcast combinations [4];

2) preserve existing combinations except those in communities served by only one daily newspaper and one broadcast station encompassing the community with a city grade signal; in the latter cases, one of the interests must be divested within five years.[5]

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[4] Both havles of a combination cannot be transferred to the same party except by inheritance, 50 F.C.C. 2d 1046, 1076 (1975). A broadcast license will not be issued to a local daily newspaper; if a broadcast licensee acquires a daily newspaper in the city in which it is licensed, it must dispose of the station within one year. *Id.* at 1074-76, 1099-1107.

[5] Several definitions and qualifications are important. "Ownership" is not limited to majority stock ownership but "includes actual working control in whatever manner exercised." 47 C.F.R. § 73.636 note 1 *et seq.* Noncommercial educational stations and college newspapers are not subject to the divestiture rules and their presence in a community does not exempt local monopolies from the rules. 47 C.F.R. § 73.636(b), and note 10. "A daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication." 47 C.F.R. § 73.636 note 10. A "city grade signal," the most intense under the Commission's rules, provides a clear signal to the entire community to which the station is licensed. 47 C.F.R. §§ 73.685, 73.315, 73.188, The Commission chose not to use a grade A or grade B contour in determining the number of media voices in a community. A "grade A contour" is the line at which a good picture may be expected to be available for at least 90% of the time at the best 70% of receiver locations at the outer limits of that service area; a "grade B contour" is the line at which a good picture may be expected to be available for at least 90% of the time at the best 50% of reciever locations. Clarksburg Publishing Company v. F.C.C., 225 F.2d 511, 516 n.12 (D.C.Cir. 1955). For Commission policy on waivers and petitions to deny, *see* notes 19-21 *infra* and accompanying text.

Under the latter rule, roughly 90% of existing combinations are grandfathered. For the reasons expressed below, we affirm the prospective ban but vacate the rules dealing with existing combinations.

I. The Rulemaking Proceeding and Order

A. *The Proceeding.*

The Commission has long been aware that concentrated ownership threatens the public interest in a diversified mass communications media. The Commission's first multiple ownership rules, adopted in the 1940's, prohibited any party from owning or controlling more than one broadcast station in the same broadcast service in the same area.[6] As a result of the AM radio rules, divestiture was ordered in 24 cases.[7] The rules have since been tightened several times, most recently in the early stages of Docket 18110 to prohibit the common ownership of more than one broadcast station of any

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[6] Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941); 8 Fed. Reg. 16065 (1943). About this time the Commission also adopted the "Chain Broadcasting" rules, designed to combat the growing power of networks. As a result of these rules, the National Broadcasting Company was required to divest one of its dual networks, which eventually became the American Broadcasting Company. Docket 5060, May 1941. The Supreme Court upheld the Commission's authority to promulgate these rules, noting that the Commission may call on antitrust policies in implementing its public interest mandate. NBC v. United States, 319 U.S. 190, 223 (1943). The Commission also conducted during the 1940's an inquiry into potential problems of newspaper and broadcast station cross-ownership, but decided at that time to control cross-ownership abuses on a case by case basis rather than by rule. 6 Fed. Reg. 1580, 3302 (1940); 9 Fed. Reg. 702 (1944).

[7] 1945 FCC Annual Report at 2. The FM radio and VHF TV rules operated prospectively only.

type in the same service area.[8] The Commission enacted these rules without compiling a substantial record of tangible harm; it rested instead on its belief that "the effects of competition or its absence," are "not readily susceptible of quantitative ascertainments." 29 Fed. Reg. 7535, 7537, Docket 14711 (1967). The Commission has always viewed diversification as a factor of central importance in comparative license hearings.[9]

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[8] In 1953 the Commission imposed numerical limitations on the number of stations one individual could control, its authority being upheld in United States v. Storer Broadcasting, 351 U.S. 192 (1956). The multiple ownership rules were amended once again in 1964 to define precisely the standard for determining prohibited contour overlap. Multiple Ownership Rules, 2 Pike & Fischer RR 2d 1588 (1964).

[9] In McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C.Cir. 1956), for example, the court wrote, "In considering the public interest the Commission is well within the law when, in choosing between applications, it attaches significance to the fact that one, in contrast to the other, is dissociated from existing media of mass communication [newspapers] in the area affected," *quoting* Sripps-Howard Radio, Inc., v. FCC, 189 F.2d 677, 383 (D.C.Cir. 1951). In its *1965 Policy Statement on Comparative Renewal Hearings*, the Commission concluded that diversification should be a primary factor in allocating contested broadcast assignments. The Commission wrote,

> Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.

1 F.C.C.2d 393, 394. The Commission has applied the *1965 Policy Statement* in noncomparative hearings, although by its terms it is not applicable. Seven League Productions, Inc., 1 F.C.C. 2d 1597 (1965); A. H. Belo Broadcasting Corp., 47 F.C.C. 2d 540 (1974). *See generally, Comparing the Incomparable, Towards a Structural Model for FCC Comparative Renewal Hearings*, 43 U.CHI.L.REV. 573 (1976)

In 1970 the Commission broadened the scope of ongoing rulemaking proceedings, Docket 18110, to consider whether newspaper-broadcast affiliation was in the public interest.[10] 22 F.C.C. 2d 339. Citing figures indicating the high incidence of newspaper-television affiliation,[11] and the popular dependence of these media as information sources, the notice of proposed rulemaking stated that, as with two television stations, it is not "desirable that these two organs . . . be under the same control in any community." *Id.* at 344, 346. The Commission suggested that promotion of media competition and maximum diversification of media viewpoints might require the separation of all co-located newspaper-broadcast combinations. Since the Commission contemplated allowing divestiture to take place over five years under favorable tax treatment,[12] it expressed confidence that such a rule

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[10] Examination of newspaper-television station cross-ownership is a logical outgrowth of the Commission's ongoing concern with concentrated ownership. Apart from Docket 18110, the Commission has recently prohibited television networks from owning cable interests and telephone companies from operating cable systems in their service areas. *See* Tacopi v. F.C.C., 451 F.2d 1142 (9th Cir. 191); General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). The Commission also considered ordering newspapers to divest their cable systems, *CATV Notice of Proposed Rulemaking and Inquiry*, Docket 18891, 23 F.C.C.2d 833 (1970), but ultimately decided not to do so, 52 F.C.C. 2d 170 (1975).

[11] At the time of the *Notice of Proposed Rulemaking*, there were 94 newspaper-television combinations, of which 34 were in the top 50 markets, and 52 in the top 100. 22 F.C.C. 2d at 345. In 1975, 79 were still intact.

[12] The Commission indicated it would certify divestiture sales under the favorable gains provision of section 1071 of the Internal Revenue Code of 1954, as amended. 26 U.S.C. § 1071. The Commission also theorized that swapping of affected stations would further minimize losses. 22 F.C.C.2d at 347.

would produce no more than minimal economic losses. *Id.* at 347-48. Comments were invited.

Not surprisingly, the proposed rules generated considerable interest. Nearly 200 parties filed comments. In addition, roughly 25 major studies were lodged, *Order* at 1090-1094, although as will be explained in Section IV-A *infra*, the studies were of surprisingly little value.[13] In March 1974, the Commission requested additional comments dealing primarily with the central problem of newspaper-television cross-ownership. 45 F.C.C. 2d 768. Forty eight parties filed fresh comments.[14] Three days of oral argument were held and the *Order* was released on January 31, 1975.

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[13] In its brief, the Commission characterizes the studies as generally "inconclusive or unrealistic." Br. at 9, n.6. Although it did not state this opinion so badly in the *Order*, it repeatedly criticized many of the individual studies. *See generally*, Note, *Media Cross-Ownership—The FCC's Inadequate Response*, 54 TEX.L.REV. 336 (1976).

[14] Amicus curiae, Public Interest Research Group *et al.*, contend a remand is necessary because the Commission failed to develop an adequate "public interest" record. Only 2 of the original 200 comments and 6 of the subsequent 48 filings were filed by public interest groups. In light of our disposition of this case, we have no need to consider whether an agency has an affirmative obligation, not imposed by the Administrative Procedure Act, to seek out public interest comments. In any event, Docket 18110 was exceptionally well publicized. The Commission deferred all petitions to deny that alleged undue economic concentration until the docket was completed, calling further attention to the existence of the docket. *See, e.g.*, Hale v. F.C.C., 425 F.2d 556 (D.C.Cir. 1971); Stone v. F.C.C., 466 F.2d 316 (D.C. Cir. 1972). And, unlike NAITPD v. F.C.C., 502 F.2d 249, 258 (2d Cir. 1974), public interest groups actively participated in the proceeding. We would, of course, applaud any effort of the Commission to broaden the base of its rulemaking proceedings.

B. *The Order.*

After summarizing the comments and studies filed in Docket 18110, the Commission explained its justification for the prospective ban. Although the Commission had at one time encouraged newspaper sponsorship of broadcast stations, it concluded this policy was no longer warranted because broadcast licenses had become attractive to other types of investors. It had come to believe that "any new licensing should be expected to add local diversity," *Order* at 1075. Because granting a broadcast license to a local newspaper owner could not be expected "to enhance diversity," *id.*, the Commission decided to prohibit the creation of future combinations. However, a geographic limit was placed on this ban because "there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership." *Id.* Recognizing that various limits could be imposed, the Commission chose to employ the pattern used in earlier multiple ownership rules; the ban applies only if the station in question would or does encompass the common city with a city grade signal. *Id.*[15]

The Commission then focused on the more difficult question—what to do with existing co-located combinations. Initially, the Commission noted it had not yet paid sufficient consideration to certain possible side-effects of divestiture—reduction of local ownership, disruption of broadcasting continuity and local economic dislocations. *Order* at 1073. Claiming that stability and continuity of ownership serve the public interest, the Commission concluded that "a mere hoped for gain in diversity" was not adequate cause for disrupting ownership. Divestiture would be ordered "in only the most egregious cases." *Order* at 1080. In framing its *Order*,

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[15] *See* note 5 *supra*.

the Commission chose not to focus, as the Justice Department suggested, on competition for advertising, citing authority that it has discretion to determine the weight to be given antitrust principles in shaping its regulatory policy.[16] Instead, the Commission stated that the number of media voices serving a given area was a more important concern.

> If our democratic society is to function, *nothing can be more important* than insuring that there is a free flow of information from as many divergent sources as possible. . . .

Order at 1079 (emphasis added).

The Commission then explained a combination would be considered an "egregious case" if it had an "effective monopoly in the marketplace of ideas" with respect to local issues. Although the Commission stated it had examined "every" combination "known to us," *Order* at 1081, the record contained no evidence suggesting which combinations were monopolies in this sense. Instead, the Commission relied heavily on its experience, determining that a non-affiliated broadcast station encompassing the city of publication with a city grade signal could reasonably be expected to provide a sufficient additional voice on local matters, but that stations bathing the area with the weaker Grade A or Grade B signals could not.[17] Thus, the Commission ordered divesti-

[16] Northern Natural Gas Co. v. F.P.C., 399 F.2d 953, 959 (D.C.Cir. 1968) (citing cases). Earlier in the *Order*, however, the Commission stated that the prospective rules were based primarily on First Amendment concerns whereas the retroactive rules were based on both First Amendment and antitrust policies, *Order* at 1049.

[17] For definitions of these contours, *see* note 5 *supra*. Several parties vigorously asserted that Grade A and Grade B signals should be considered in determining the number of effective media outlets because, under the Commission's local ascertainment rules, stations are obligated to consider the needs of those residing within those contours. Although conceding that a station has a secondary obligation to ascertain the needs of nearby communities, the Commission nonetheless observed that it would be unrealistic to expect a station to give adequate attention to the local problems of areas on the margins of its contour. *Order* at 1082.

ture only where no other newspaper or city grade broadcast station was operating in the locality of the combination.[18]

As in its notice of proposed rule making, the Commission stressed that temporary or permanent waivers would be granted where appropriate because it did not intend to work a forfeiture through divestiture.[19] It made clear, though, it would not reconsider in waiver proceedings issues resolved in Docket 18110. *Order* at

[18] Divestiture was ordered in the cases of 7 out of 79 television-newspaper and 16 radio-newspaper combinations. In addition, a television-newspaper combination in Hickory, North Carolina, and a radio-newspaper combination in Brookfield, Missouri, fell within the divestiture requirement. But the Commission *sua sponte* granted waivers in each case. *Order* at 1085.

On one level, radio and television stations are treated equally under these regulations; divestiture is required if either type of station and an affiliated daily newspaper are the only media voices in the community. However, the existence of a city grade television station is sufficient to exempt a radio combination from divestiture, but the existence of a city grade radio station does not exempt a television combination. The difference in treatment is premised on the fact that television is the vastly more powerful medium.

[19] Temporary or permanent waivers would be appropriate if, for example, it were impossible to sell one of the interests or if sale could only be accomplished at an artificially depressed price. *Order* at 1085.

332-622 O - 77 - 2

1085.[20] Finally, the Commission indicated it did not intend to ignore antitrust considerations entirely, and would therefore continue to entertain petitions to deny on grounds of economic concentration. However, it tightened the requirements for granting such petitions, holding that it would set a hearing only when a violation of the Sherman Act was alleged. *Order* at 1088.[21]

The Commission reconsidered its regulations but did not materially alter them. 53 F.C.C. 2d 589 (1975). The various petitioners then brought this appeal assailing the rules on numerous grounds.

The remainder of the opinion will be organized as follows, with the first page of each section being noted in parentheses.

II. Validity of the Prospective Ban (slip p. 17)

A. Whether the Prospective Ban Has a Rational Basis (slip p. 18)

B. Whether the Prospective Ban Exceeds the Commission's Authority (slip p. 24)

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[20] In its *Reconsideration*, the Commission explained this point. A petition contending that in general, the presence of independent educational stations should exempt monopoly combinations from divestiture would not be set for hearing because that issue had been determined in the docket. On the other hand, a hearing would be set if the petition alleged that a particular educational station in fact was providing a community with an adequate additional voice. 53 F.C.C.2d at 235.

[21] The Commission had previously considered factors such as the size, extent and location of areas served; the number of people served; the classes of stations involved; and the extent of other competitive service to the areas in question in passing on petitions to deny on grounds of economic concentration. 47 C.F.R. §§ 73.53(b), 73.420(a)(2), 73.636(a)(2).

C. Whether the Prospective Ban Violates the First Amendment (slip p. 29)

III. Whether the Commission May Adopt Any Rule That Orders Divestiture Without an Evidentiary Hearing (slip p. 33)

IV. Validity of the Divestiture Rule Adopted by the Commission (slip p. 36)

A. Record Support for the Divestiture Order (slip p. 37)

B. Whether the Commission May Properly Require a Showing of Tangible Public Interest Harm to Support Divestiture (slip p. 47)

Conclusion (slip p. 59)

II. Validity of the Prospective Ban

The Commission must allocate use of the public airways by granting renewable licenses of no more than three years in the "public interest, convenience and necessity." 47 U.S.C.A. §§ 301, 303, 309(a). Congress purposely left this mandate open-ended so that the Commission could fashion its regulations in light of changing conditions. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). In exercising its function, the Commission may enact eligibility standards for licenses. *United States v. Storer Broadcasting*, 351 U.S. 192 (1955). Furthermore, the Commission may, under its authority "to encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g), enact rules designed to curb potential abuses, *Metropolitan Television Co. v. F.C.C.*, 289 F.2d 874 (D.C. Cir. 1961).

Because the Commission has the primary responsibility for allocating use of the electromagnetic spectrum, a presumption of correctness attaches to its regulations.

National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Of course, courts are not to rubber-stamp Commission regulations. On the contrary, review is to be "searching." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). This is especially so where the regulations touch on areas heavily laden with First Amendment interests.[22] Yet despite this care, courts are not to substitute their judgment for that of the Commission or review the facts de novo. With respect to the prospective rules, which reflect a legislative type policy judgment,[23] as opposed to the retroactive rules, which purport to be based also on factual considerations,[24] our primary task will be to ensure that the regulations are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(a). In addition, we must examine the contentions that the rules exceed the Commission's authority and violate the First Amendment.

A. *Whether the Prospective Ban Has a Rational Basis*

The licensing of speakers required by the Communications Act is unprecedented and has been justified

[22] More intense review is appropriate when Commission regulations or decisions trench on Constitutional rights, such as free speech. The Commission's expertise does not extend to Constitutional interpretation. National Broadcasting Co., Inc. v. FCC, 516 F.2d 1101 (1974); Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C.Cir.) (Bazelon, Statement as to why he would grant rehearing en banc), *cert. denied*, 414 U.S. 914 (1973).

[23] "The rules are not in the least premised on the existence of improprieties in the operation of the media holdings." *Order* at 1085.

[24] The factual nature of the retroactive rules will not alter the intensity of review but only the direction it takes. *See* text and notes at notes 53-54 *infra*.

under the First Amendment because of the scarcity caused by the physical limitations of the electromagnetic spectrum. The need for some regulation of the airwaves became clear in the 1920's when there was none. "With everybody on the air, nobody could be heard." *National Broadcasting Co. v. F.C.C.*, 319, U.S. 190, 226 (1943). In order to ensure the public's ability to hear some speakers, the rights of other potential speakers were curtailed. The hard choice was between forcing free speech to bend or watching it break.

The licensing scheme was based on antitrust policies as well. It was feared that the conditions of scarcity would make broadcasting a natural monopoly so as to silence a diversity of opinion.[25] "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

The Commission has recognized that a policy of diversity is central to the Communications Act,[26] and it has

[25] *See, e.g.*, Remarks of Senator Howell, during debates on Radio Act of 1927, the predecessor act to the current Communications Act. 67 Cong. Rec. at 12503 (1926).

[26] *See* 47 C.F.R. §§ 73-131-.138; .231-.240; .35; .658; 636 (1974); Frontier Broadcasting Co. 27 F.C.C. 2d 486 (1971). *See also* United States v. Midwest Video Corp., 406 U.S. 649, 665-670, 92 S.Ct. 1860, 1869-1871, 32 L.Ed. 2d 390 (1972); Metropolitan Television Co. v. FCC, 110 U.S.App. D.C. 133, 289 F.2d 874 (1961); Carter Mountain Transmission Corp. v. FCC, 116 U.S.App.D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951, 84 S.Ct. 442, 11 L.Ed.2d 312 (1963); Carroll Broadcasting Co. v. FCC, 103 U.S.App.D.C. 346, 258 F.2d 440 (1958); Simmons v. FCC, 83 U.S.App.D.C. 262, 169 F.2d 670, *cert. denied*, 335 U.S. 846, 69 S.Ct. 67, 93 L.Ed. 396 (1948); Chicagoland TV Co. 11 F.C.C. 2d 119, 136-137 (1967) (Hearing Exam.); *See* Policy Statement on

Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-396 (1965). Note, Diversification and the Public Interest: Administrative Responsibility of the FCC, 66 YALE L.J. 476 (1957).

It is judicially settled that the Commission may, indeed must, consider diversification of ownership in the licensing of broadcast frequencies. Citizens TV Protest Comm. v. FCC, 121 U.S.App.D.C. 50, 348 F.2d 56 (1965); Clarksburg Publishing Co. v. FCC, 96 U.S.App.D.C. 211, 336 F.2d 511 (1955). *See* United States v. Midwest Video Corp., 406 U.S. 649, 665-670, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972); National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); United States v. Storer Broadcasting Co., 351 U.S. 102, 76 S.Ct. 763, 100 L.Ed 1081 (1956); Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed. 2d 701 (1971); Mansfield Journal Co. v. FCC, 86 U.S.App.D.C. 102, 180 F.2d 28 (1950). *See also* Pinellas Broadcasting Co. v. FCC, 97 U.S.App.D.C. 236, 241, 230 F.2d 204, 209, *cert. denied*, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956) (Bazelon, J. dissenting); Scripps-Howard Radio v. FCC, 89 U.S.App.D.C. 13, 189 F.2d 677, *cert. denied*, 342 U.S. 830, 72 S.Ct. 55, 96 L.Ed. 628 (1951).

Unfortunately, the Commission has not always pursued its diversification policy with unrelenting vigor. *See* Pinellas Broadcasting Co. v. FCC, 97 U.S.App.D.C. 236, 251, 230 F.2d 204, 209, *cert. denied*, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956) (Bazelon, J. dissenting) H. Friendly, The Federal Administrative Agencies 66-67 (1962); Schwartz, Comparative Television and the Chancellor's Foot, 47 Geo. I.J. 655, 673-678, 690-694 (1959); *see also* H. Geller, A. Modest Proposal to Reform the Federal Communications Commission 3-12 (Rand Corp. 1974) (describing FCC policy on development of UHF and VHF bands). In addition, its inability to forestall trafficking in licenses has at times rendered diversification an empty gesture. *See generally* Crowder v. FCC, 130 U.S.App.D.C. 198, 201-202, 399 F.2d 569, 572-573, *cert. denied*, 393 U.S. 962, 89 S.Ct. 400, 21 L.Ed.2d 375 (1968), *aff'g* Harriman Broadcasting Co., 9 F.C.C. 2d 731 (1967); 47 C.F.R. § 1.597 (1973); Moline Television Corp., 31 F.C.C. 2d, 263, 297-298 (1971) (Johnson, Comm'r. dissenting).

denied licenses to otherwise qualified applicants on the strength of that policy.[27] Since denying access to the airwaves to some involves a substantial, though at this time necessary, restriction of speech, it follows that the Commission acts properly when it attempts to promote diversity by allocating stations to those without control over an alternative major media voice. The Supreme Court has given its approval to a diversity policy based on First Amendment and antitrust considerations. The First Amendment "rest on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1944).[28] "The 'public interest' standard necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1972). In addition, even though the Commission does not enforce the antitrust laws, the Court has said the Commission may call on antitrust policies to promote diversity in giving content to "the public interest, convenience and necessity." *United States v. Radio Corporation of America* 385 U.S. 334, 351 (1958).

Nevertheless there are limits to diversification policy.[29] One limitation is contained in the statutory and First Amendment commands that the Commission shall not

[27] *E.g.* McClatchy Broadcasting Co. v. F.C.C. 239 F.2d 15 (1956), *cert. denied*, 353 U.S. 918 (1957).

[28] Although this statement was not made in a case reviewing FCC regulations, the Commission properly relied on it as support for its diversification policy. *Order* at 1050. The Court has referred to that language with approval in subsequent cases involving Commission regulations. *E.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1968).

[29] Apart from those suggested in the text, any regulation must be able to withstand rational basis scrutiny.

censor.[30] The Supreme Court upheld the personal attack and political editorializing portions of the Commission's fairness doctrine in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1968). Those rules were designed to invigorate public debate by requiring broadcasters to air responses to its programming in certain circumstances. The purpose of the rules is salutary.

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.

395 U.S. at 390.

Nevertheless, the fairness doctrine may well mark the outer limits of a permissible diversification policy which relies on direct government control over the content of broadcast programs.[31] The *Red Lion* Court carefully

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[30] 47 U.S.C. § 326 (1970).

[31] Another limitation is contained in the factual predicate for licensing—scarcity. At present, in many cities the available broadcast spectrum is fully occupied. *See, e.g., Red Lion, supra*, 395 U.S. at 398 n.25. However, currently available technology could eliminate this scarcity. With existing equipment and technology "a single coaxial (tv) cable can carry between 28 and 36 channels of television, plus the entire AM and FM radio bands and a quantity of other nonvisual electronic signals." Smith, *The Wired Nation* 7 (1972). And in ten years it may be possible to provide each home with as many as 400 cable channels. *Id.* An innovation developed by the Bell System offers even more promise than conventional cable service. Developed primarily for telephone service, so-called "lightguides" made of broadband fiber optics have a capability of carrying 50,000 telephone calls or their equivalent on a cable one-half inch in diameter. One cable operator has begun experimental use of lightguides for television transmission, reportedly with excellent results. Broadcasting, July 19, 1976, 44.

Alleviating scarcity would not only eliminate the need for promoting diversity, it would also presumably eliminate the

withheld approval from rules that would more directly interfere with the broadcaster's First Amendment rights, such as one restricting a broadcaster from airing its own views. 395 U.S. at 367.[32]

In any event, the Constitutional difficulties with promoting diversity through speech restrictive means highlight the virtue of the prospective cross-ownership rules. The prospective ban is an attempt to promote diversity without government regulation of or supervision over speech. The rules attempt to promote vigorous public debate not by imposing restrictions on broadcasters, but simply by permitting more to be heard. Of course, there is no guarantee that the prospective ban will increase diversity in all cases, "the possible benefits of competition do not lend themselves to detailed forecast." *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1952).

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need for all licensing save that necessary to prevent interference. Of course, the expense required to produce quality programming and lay cable may limit the number of voices that in fact reach each home, but such constraints are common to many businesses. Broadcasting would no longer present unique problems requiring unique regulation. This conclusion to some extent assumes, however, as the Ninth Circuit has suggested, ACLU v. FCC, 235 F.2d 1344, 1351 (1975), that the Commission can compel cable systems to be common carriers, a matter which is not, of course, before us. *See also* United States v. Midwest Video Corp., 406 U.S. 649 (1972). In any event, these hopes for the future do not diminish the importance of encouraging diversity today. This footnote reflects the views of only the author of this opinion.

[32] Such a statute might be proposed to promote public debate. One way to attempt to equalize debate is by boosting the power of the weaker voice; another way is by reducing the power of the dominant one.

But that does not make the attempt irrational.[33] It is not unreasonable for the Commission to assume that the licensing of an independent, rather than an affiliated station, offers greater hope of providing the community a new voice and to incorporate that assessment in its licensing policy. The First Amendment seeks to further the "search for truth." Surely that search will be facilitated by government policy that encourages the maximum numbers of searchers.

B. *Whether the Prospective Ban Exceeds the Commission's Authority*

The prospective rules, it is argued, cannot stand because, apart from their rationality, the Commission lacks authority to promulgate rules that restrict ownership of broadcast stations by newspapers. We hold that the prospective ban is within the Commission's rulemaking authority.

Although no provision of the Communications Act expressly grants the Commission authority to restrict newspaper ownership of broadcast stations, such express authority is not essential to the validity of Com-

[33] We also reject the argument that the prospective ban is arbitrary because it is based on one factor to the exclusion of others customarily relied on by the Commission. Courts are ordinarily uncomfortable with a claim that the "public interest" can be determined by reference to one, and only one factor. Here, however, the Commission has explained why it considers diversity to be a factor of exceptional importance and has anchored that explanation to Supreme Court decisions. Furthermore, forbidding the Commission from reasonably relying exclusively on one factor would prevent the Commission from enacting license qualifications, although it clearly has power to do so. *Storer Broadcasting, supra*; FCC v. Allentown Broadcasting Co., 349 U.S. 358 (1955).

mission regulations.[34] 47 U.S.C. § 309(a) requires the Commission to find the "public interest, convenience and necessity will be served" by the grant of a license. 47 U.S.C. § 303 (r) grants the Commission authority to "make such rules and regulations not inconsistent with law, as may be necessary to carry out" the Act while 47 U.S.C. 154 (i) grants rule-making authority to make rules "as may be necessary in the execution of [the Commission's functions]."[35] In *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1955), the Supreme Court upheld a portion of the Commission's multiple ownership rules promulgated under these provisions.[36] In essence, *Storer* permits the Commission to codify in rule its understanding, if reasonable, of the public interest licensing standard. (*See* 351 U.S. at 202-03). Here, the Commission has determined the public interest would not be served by granting broadcast licenses to newspapers and in Section II-A we held this policy was reasonable. It requires no extension of *Storer* to conclude the Commission possessed statutory authority to impose the prospective ban.[37]

[34] United States v. Southwestern Cable Co., 392 U.S. 157 (1967).

[35] In addition, the Commission cited 47 U.S.C. § 152(a), and 154(j) in support of the regulations.

[36] The regulations upheld in *Storer* placed a numerical ceiling on the number of broadcast stations a party could control.

[37] The vitality of *Storer* is attested by its application in FPC v. Texaco, 377 U.S. 33, 39 (1964), where the Court stated:

> [T]he statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.

Storer aside, ANPA contends the Commission is disabled from enacting this rule because the Commission's first general counsel, Hampson Gary, was of the opinion that the Commission lacks the requisite statutory authority. In rejecting this contention, we need not determine what weight should be given to an agency's initial interpretation of its mandate [38] because Mr. Gary did not conclude that the Commission lacks statutory authority to enact a regulation restricting newspaper ownership. The question Mr. Gary addressed was whether "the Commission may deny an application of a newspaper for *a license* on the ground that it is against 'public policy.'" [39] After distinguishing "public policy" from the statutory standard of "public interest, convenience and necessity," [40] he concluded that a license could not be denied on public policy grounds but that newspaper ownership could bear on the public interest. Mr. Gary did not consider, as would be relevant here, whether the Commission may enact license qualifications in the public interest.[41]

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[38] *See generally*, 1 *K. Davis, Administrative Law Treatise*, § 506 (1958), (1970 Supp.).

[39] Legal Opinion of FCC General Counsel Hampson Gary submitted to the Senate Interstate Commerce Committee, Jan. 25, 1937, at 1, J.A. 239 (emphasis added).

[40] Mr. Gary defined "public policy" as:

> a term of vague and uncertain meaning, which it pertains to the law-making body to define, and courts are apt to encroach on the domain of that branch of government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Smith v. San Francisco & N.P.R. Co., 47 Pacific 582, 489 (Cal. 1897).

[41] ANPA also argues Congress has affirmatively declared the Commission lacks authority to ban newspaper ownership of broadcast stations. Between 1946 and 1952 Congress considered legislation that would have presented the Commission from barring per se license applications from newspapers. Congress failed to enact the legislation, ANPA submits, because it believed the Commission lacked the authority in question so that the legislation would have been unnecessary.

Although this recitation of legislative history is less than persuasive, *see Order* at 56, we reject this argument on broader grounds. As the Supreme Court recognized in United States v. Wise, 370 U.S. 405, 411 (1961), the history of subsequent legislative activity is not useful in determining the meaning of the original legislation when enacted. "Statutes are construed by the courts with reference to the circumstances existing at the time of passage." *Id.* Otherwise, the meaning of a statute might never be settled, even though the statutory language had never been changed or reenacted with a different intent. Nor do the rules under review involve regulation of an industry over which the Commission lacks jurisdiction. The prospective ban simply imposes qualifications for broadcast licensees. It does not impose regulations on the conduct of the newspaper industry.

A more substantial argument is that this court already has decided the Commission lacks authority to restrict newspaper ownership of broadcast stations. The case relied on most strongly is *Stahlman v. F.C.C.*, 126 F.2d 124 (D.C.Cir. 1942),[42] where after holding that an F.C.C. subpoena was supported by the Commission's general investigative powers, the Court wrote:

> [The Commission's power] does not embrace and should not be extended by implication to embrace a ban on newspapers as such . . . . This, we think, would be in total contravention of that equality of

[42] One pre-*Stahlman* case was also relied on. In Tri-State Broadcasting Co. v. FCC, 96 F.2d 564 (D.C.Cir. 1938), the court wrote it knew of no rule or statute prohibiting a newspaper from owning a radio station. As the Commission stated in its *Order*, "We fail to see how this justifies a ban on promulgating such a rule." *Order* at 1051.

> right and opportunity which Congress has meticulously written into the Act. . . .

126 F.2d at 127.

Although this language appears to resolve the question of statutory authority, in fact it does not. First, since the Commission had not then enacted a rule restricting broadcast ownership by newspapers, the issue of statutory authority was not before the court. Consequently, as Judge Edgerton pointed out in his separate concurrence, the quoted language is dicta. 126 F.2d at 128.

More significantly, the premise of the paragraph containing the quoted language is that "[t]he Communications Act requires no more of an applicant than proof of citizenship, character, and financial and technical qualifications to operate in the public interest." *Id.* at 127. The next sentence implies that any applicant meeting these qualifications must be granted a frequency if one is available. However, this view of the Commission as a "traffic cop" of the airwaves was rejected by the Supreme Court the next year in *National Broadcasting Co., supra.* In order "to secure the maximum benefits of radio to all the people of the United States . . . Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio." 319 U.S. at 217. Thus *Stahlman* was based on a reading of the Commission's Act that has not prevailed.[43]

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[43] *Stahlman* was cited with approval in McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C.Cir. 1956), *cert. denied*, 353 U.S. 918 (1957), where the court held the Commission could attach decisive significance to media diversification in a comparative renewal hearing where the applicants were indistinguishable on the basis of the Commission's other comparative criteria. The court did not consider whether the Commission could, *if it chose to*, base a rule exclusively on diversification.

In sum, *Storer* supports the Commission's exercise of rulemaking power and none of the materials cited requires a different conclusion.

C. *Whether the Prospective Ban Violates the First Amendment*

It is argued that the prospective ban unconstitutionally conditions the First Amendment right to publish a newspaper.[44] It is not argued, as indeed it could not be, that the ban violates the First Amendment rights of newspaper owners as would-be broadcasters. Denial of a license application does not abridge the applicant's First Amendment rights. *F.R.C. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933), *National Broadcasting, supra*, 319 U.S. at 226. "No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Red Lion supra*, 395 U.S. at 389, quoting *National Broadcasting*, 319 U.S. at 227. Of course, it does not follow that the First Amendment has no role in the licensing system. The Commission may not use the licensing process as a censoring mechanism, choosing those applicants whose views it favors.

> Congress did not authorize the Commission to choose among applicants upon the basis of their political,

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[44] It was also argued in the briefs that the prospective ban violates equal protection. This argument was based primarily on Morey v. Dowd, 354 U.S. 457 (1957), which was overruled between filing of the briefs and argument, City of New Orleans v. Dukes, 44 U.S.L.W. 5075. At argument, counsel noted this fact and evidently abandoned the equal protection argument. In any event, we see no merit in it. As explained in Section II-A, *supra*, there is a rational basis for the rule, and, as this section makes clear, strict scrutiny is not required because the ban does not trench on protected First Amendment interests.

> economic or social views . . . If it did, or if the Commission by these regulations proposed a choice among applicants on some such basis, the First Amendment issue before us would be wholly different.[45]

National Broadcasting, 319 U.S. at 226. But no claim of censorship can be made here. The Commission has only decided that the public interest is better served by assigning available broadcast frequencies to those without a co-located major media voice.

Freedom of the press does not necessarily shield newspaper publishers from regulation that may make publication more difficult. A newspaper could not, for example, plausibly claim the federal income tax violates the First Amendment because payment of the tax makes publica- more difficult, or perhaps impossible. *See Associated Press v. United States, supra.* So the question presented is not whether the prospective ban burdens newspapers—it clearly may do so—but rather whether there is something special about the burden that renders it unconstitutional. The relevant case law does not support such a contention.

In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Supreme Court held unconstitutional a state tax on net receipts imposed only on newspapers with weekly circulations of over 20,000. Justice Sutherland, writing for the Court, likened the tax to those imposed by the British on the American colonies in order to suppress dissent. *Id.* at 246-49. The tax was bad, he wrote because it was "a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled." *Id.* at 250. Here, the purpose of

[45] *See also*, 47 U.S.C. § 326; *Red Lion*, 395 U.S. at 390; Brandywine-Main Line Radio v. FCC, 473 F.2d 63 (Bazelon, C.J. dissenting); Kalven, *Broadcasting and the First Amendment*, 10 J. LAW & ECON. 15, 43-44.

the Commission's prospective regulation is precisely the opposite.[46] The rule is intended and reasonably designed to increase the diversity of information an opinion circulated by increasing the number of media voices in the community. Neither *Grosjean* nor the other cited cases are controlling.[47]

The ANPA admonishes us to heed the warning uttered by the Supreme Court in *Miami Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974);

> Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitation . . . *Id.* at 256.

However, a restraint is not unconstitutional merely because it is unfamiliar. Unable to claim the ban violates

[46] *Grosjean* may be a shaky precedent because it seemingly calls for judicial inquiry into the legislature's intent. United States v. O'Brien, 391 U.S. 367, 384 (1967). This is less difficult with respect to agency regulations because agencies must provide a statement of the regulation's purpose. 5 U.S.C. § 554(c).

[47] Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186 (1945), is mistakenly cited for the proposition that legislation can never single out newspapers for special treatment. In fact, that issue was never reached. The case held, largely on the authority of Associated Press v. United States, 326 U.S. 1 (1945), that the Fair Labor Standards Act could be applied to any business, including newspapers. After noting the First Amendment does not forbid regulations which do not restrain expression, the Court said the case did not involve the issue of special treatment raised in *Grosjean*. And an argument based on Speiser v. Randall, 357 U.S. 513 (1958), also fails. *Speiser* involved a statute that conditioned a property tax exemption on the signing of a loyalty oath. The statute was invalidated not because it conditioned the exemption on the oath, but because the oath proscribed constitutionally protected speech. This was held to be a penalty for engaging in free speech. The prospective ban, however, does not regulate let alone punish any speech and thus is not invalid under *Speiser*.

232-622 O - 77 - 3

their First Amendment rights as would-be broadcasters, petitioners have not demonstrated the ban trenches on the constitutionally protected interests of newspaper publishers.[48] The ban neither mandates nor prohibits what may be published. It only forbids the formation of co-located combinations the Commission has determined do not serve the public interest. Of course, in serving the public interest the ban may indirectly affect the economics of publication, but the First Amendment does not provide a shield against this. *Associated Press*, 326 U.S. at 20.

In fact, the very claim of constitutional abridgement is ironic. First of all, the prospective ban is an attempt to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech. Second, it may be that newspapers can not truly be free of government interference so long as they operate government licensed broadcast stations. An unsavory fact of life is that government has the power to regulate expression by a "raised eyebrow" reminding the broadcaster of the triennial government renewal process. A newspaper opens itself up to similar intimidation by affiliation with a broadcast station.[49] "It

[48] The principle of least restrictive alternatives, it is also argued, precludes the Commission from imposing a flat ban on future combinations. This argument contains a useful insight, but misapplies it. Systematic licensing of speakers itself severely strains free speech. Thus it is entirely appropriate for the Commission to attempt to restrict the access of the smallest possible number. Arguments that the ban is an unconstitutional prior restraint or overbroad are also unpersuasive.

[49] "The main, main thing is The Post is going to have damnable, damnable problems out of this one. They have a television station . . . . And they're going to have to get it renewed." Taped Statement of Richard Nixon to H. R. Haldeman and John Dean, Sept. 15, 1972, quoted in Senate

would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . ." *Associated Press*, 326 U.S. at 20.

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In conclusion, we affirm the validity of the prospective ban. We find that the ban is a rational attempt to promote the highly valued goal of diversity, that it is within the Commission's authority and that it does not violate the Constitution. We now turn to the issues regarding the Commission's treatment of existing combinations. However, before considering whether the divestiture scheme actually ordered by the Commission can be upheld, we must evaluate the arguments that the Commission may not enact any rule that orders divestiture without an evidentiary hearing.

III. Whether the Commission May Adopt Any Rule That Orders Divestiture Without an Evidentiary Hearing

From the premise that divestiture, as retroactive legislation, is inherently suspect, it is argued that divestiture is permissible only if Congress specifically intended for the Commission to enact retroactive rules and only where, quoting from the *Order* at 1083, "the need is overwhelming and the evidence is unambiguous." [50] This

Select Comm. on Presidential Campaign Activities, Final Report. S.Rep. No. 981, 93d Cong., 2d Sess. 149 (1974).

[50] This argument is made even though past divestiture orders have been approved under ordinary standards of review. In addition to the divestiture ordered as a result of the multiple ownership rules enacted in the 1940's, *see* text and notes at notes 6-7, *supra*, the Commission has adopted rules prohibiting networks from having cable interests and telephone

argument fails in light of *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (1966), where in upholding CAB regulations that affected existing licenses, this court en banc rejected an argument "that the *Storer* doctrine is restricted to regulations affecting applications for new licenses or certificates. . ." *Id.* at 628. The court said "such rule making is not to be shackled, in the absence of clear and specific Congressional requirement." *Id.* at 629. Authority to order divestiture follows not only from the fact that *American Airlines* is based on *Storer Broadcasting*, which interpreted the Communications Act, but also from the fact that the interest in a broadcast license is limited and conditional. A licensee must apply for renewal of authority every three years, and the renewal application is subject to such rules and conditions as are in effect, not during the license period, but at the time of the renewal. *Transcontinent Television Corp.*. 308 F.2d 339 (D.C. Cir. 1962). Consequently, the contention that divestiture contains elements common to suspect retroactive legislation goes not to the existence of Commission authority, but rather to the reasonableness of its exercise.[51]

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companies from owning cable systems in their service areas. In Iacopi v. FCC, 451 F.2d 1142, at 1147 (1971), the Ninth Circuit discussed the network cable divestiture rule with approval and in General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (1971), the Fifth Circuit affirmed the telephone cable divestiture rule.

[51] It may be that Commission licensing rules are valid only if they contain waiver provisions. In *Storer* the Court quoted with approval language from *National Broadcasting* that "The Commission provided that 'networks will be given full opportunity, on proper application . . ., to call to our attention any reasons why the principle should be modified or held inapplicable.'" 351 U.S. at 192 quoted 319 U.S. at 207. It is not clear whether the Court saw the waiver provision as necessary for affirmance or simply as evidence of reasonableness. In any event, there is every reason to believe that any divestiture order of the Commission will be accompanied by an appropriate waiver provision.

Section 309(e) of the Act, 47 U.S.C. § 309(e), requires the Commission to grant an applicant a hearing if unable to make the public interest finding required to grant a license. NAB advances the argument, seemingly foreclosed by *Storer* and *National Broadcasting*, that a divestiture rule violates the statutory right to a hearing. Although it is not entirely clear, the basis of this argument appears to be that *Storer* and *National Broadcasting* apply only to potential licensees not existing ones. However, as *American Airlines* suggests, these cases are not dependent on a distinction between current and potential licensees and nothing presented to us suggests why this distinction should be read into them.[52] Furthermore, divestiture would not be as harsh as denial of license renewal. A licensee facing divestiture is compensated for its loss. A licensee that fails of renewal is not.

While recognizing that the Commission has broad discretion to proceed by rulemaking or adjudication, and that it may affect the rights of individual licensees without first holding an evidentiary hearing, Gray Broadcasting argues that the Commission abused its discretion by ordering divestiture without affording affected parties a prior evidentiary hearing. Gray contends the

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[52] This Court's decision in Citizens Communication Center v. FCC, 447 F.2d 1201 (1971) does not forbid the Commission from ever denying a license without a hearing. In *Citizens*, the Commission's policy statement on comparative hearings was invalidated because it improperly denied a full hearing to qualified license challengers. The *Citizens* court carefully distinguished its disapproval of a policy of denying hearings to qualified applicants from *Storer's* approval of denying hearings to unqualified applicants. 447 F.2d at 1212, n. 34. As Section II makes clear, it is reasonable for the Commission to consider newspapers as "unqualified" to acquire licenses in the city of publication.

Commission has couched as rulemaking a proceeding that in "substance and effect is individual in impact," in other words an adjudication. The APA defines rule as "any agency statement of general *or particular applicability* and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 1001(c). Professor Davis points out that the words "or particular" were inserted after Senate passage "to assure coverage of rule making to named persons." *Davis, 7 Administrative Law* § 5.02 (1958). The nature of the evidence required to implement a rule, and not the particularity of application, determines the necessity for individualized hearings. Given our disposition of the case, however, we need not determine whether a divestiture order limited to the seven affected licensees could have been implemented without individualized hearings.[53]

In sum, the Commission has authority to promulgate a rule that orders divestiture. An altogether different question, to which we now turn, is the reasonableness of the scheme under review.

IV. Validity of the Divestiture Rule Adopted by the Commission

Since the Commission purported to limit divestiture to "egregious cases" of "effective monopoly," we must examine the record support for this determination. *Greater Boston Television Corp. v. F.C.C.*, 44 F.2d 841,

[53] Implementation of certain divestiture rules might require individual evidentiary hearings. If, for example, the Commission were to adopt on remand a policy of requiring divestiture where combinations have over 30% of the market in the community of operation, it would presumably be necessary to determine the market shares of given combinations by hearing. Across-the-board divestiture could, on the other hand, be implemented without hearings, apart from waiver proceedings.

850 (1970). The purpose of our review is only to determine whether the agency decision is rational and based on consideration of the relevant factors, *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 146; *Bowman Transportation v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); whether, in terms of the APA, the agency decision is arbitrary and capricious. 5 U.S.C. § 706(a)(A). Technically, there is no requirement that the rules be based on substantial evidence. Cf. 5 U.S.C. § 706(2)(E). Nevertheless, a decision must be considered "arbitrary and capricious" if the facts on which it is purportedly based are not supported by the record. *Associated Industries of New York State, Inc. v. U.S. Dept. of Labor*, (487 F.2d 392, 349-50 (2d.Cir. 1973) (Friendly, J.). Factual certainty is not necessary, though. An agency may regulate even though the facts do not illuminate a clear path. *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C.Cir. 1967). But it stands to reason that presumptions derived from the enabling statute and fundamental national policies taken on redoubled importance where this is so.

A. *Record Support for the Divestiture Order*

The voluminous record of the lengthy rulemaking proceeding contains little reliable "hard" information. Many filings are devoted to legal argument or representations that the editorial staff of the filer's newspaper and television station are internally segregated. In addition, roughly twenty-five major studies were submitted.[54] However, as the Commission brief points out, the studies were largely inconclusive. Br. at p.9, n.b.

We summarize the record only to the extent necessary to show that in determining its divestiture policy, the

[54] *See Order* at 1093-94 for a listing.

Commission necessarily had to rely primarily on policy, not factual considerations.[55]

(1) Effect of Common Ownership on Station Performance

Several studies attempt to demonstrate either that newspaper ownership of television stations has not harmed the public interest or, affirmatively, that newspapers have been superior broadcast licensees. The Anderson study[56] is largely of the former variety. It attempts to compare patterns of content under different ownership conditions to determine if cross-ownership produces "repressive information control," evidently on the assumption that the purpose of diversity policy is to combat such repression. The study finds no significant difference in content between individually and cross-owned stations in the sample cities and concludes divestiture is unnecessary.[57] Although the study has an objective format, it is based on content analysis that necessarily entails subjective judgments.[58]

[55] We follow the Commission's categorization, even though, as the Commission recognized, the categories overlap. *Order* at 1072-73.

[56] J. Anderson, Broadcast Stations and Newspapers: The Problem of Information Control: A Content Analysis of Local News Presentation, filed July 2, 1971, also published in J. Broadcasting 51 (1971).

[57] *Id.* at 44-45. The study also finds that cross-owned television stations depend less heavily than individually owned stations on wire services for their stories. On this basis it concludes "newspaper-allied stations appear to be better recommended." *Id.* at 46. One commentator, however, suggests this phenomenon might be due to the fact that cross-owned stations rely heavily on their sister newspapers for information. Barnett, A Critique of, and Supplement to, the Prospective Reports of the Rand Corporation at 7 (Sept. 23, 1974).

[58] Cox Broadcasting submitted studies similar to Anderson's dealing with markets in which it operates. W. McDougal & E. Sasser, Atlanta Market News and Editorial Research Study; J. Anderson & D.C. McDaniel, Two Studies: A Historical Analysis and A Content Comparison for Cox Broadcasting Corporation's Affiliated News Media in Dayton, Ohio (May 17, 1971).

The Litwin and Wroth study,[59] commissioned by the NAB, compares media performances in highly concentrated and relatively unconcentrated cities. Relying on information acquired in interviews, it finds that cross-owned stations are perceived to provide greater amounts of news coverage in greater depth than individually owned stations. In part, it attributes this superiority to greater financial stability. However, the interviewers only polled high-ranking "media personnel" and "business and community leaders."[60] Furthermore, the difficulties with an approach based on popular perceptions is highlighted by the fact that the study reports a pervasive history of news distortion and bias in one of the three highly concentrated cities examined.[61]

The Commission undertook a study[62] that compares the performance of cross and individually owned stations, but without making judgments based on content analysis. A complex multiple regression analysis finds that cross-owned stations present "6% more local news, 9% more local non-entertainment, and 12% more total local including entertainment than do other TV stations." This study, the *Order* concludes, shows "an undramatic but nonetheless statistically significant superiority in newspaper owned television station in a number of program particulars." *Order* at 1078 n. 26. However,

[59] G. Litwin & W. Wroth, The Effects of Common Ownership on Media Content and Influence (Aug. 4, 1969).

[60] *Id.* at 1-1 to 1-2, 4-4.

[61] *Id.* at 2-9.

[62] *Order* at 1094 *et seq.*, appendix C.

the Commission did not stress this superiority in deciding to grandfather most stations. Comparing amounts of programming types aired, not only requires qualitative judgments in categorizing the programs, but would also seem to be a crude measure of the public interest. More broadly, as Commissioner Robinson asserted in his dissent, it is inconsistent for newspapers to assert that they make superior broadcasters while at the same time claiming that their affiliated stations are totally independent. *Order* at 1119.

An empirical study which employed data drawn from the Commission's files attempts to determine if cross-owned stations differ from other stations in the amounts of news and other public interest programming they air.[63] According to the Commission, this study finds "no significant differences." A study by Harvey Levin [64] reaches the opposite conclusion. He finds that individually owned stations "systematically outclass" affiliated stations in their levels of public interest programming. However, several filings severely criticize Levin's methodology [65] and, although he later attempted to correct the deficiencies,[66] the Commission termed his results "inconclusive." *Order* at 1073.

Finally, the American Institute conducted a study to determine whether cross-ownership affects the level of

[63] Comment of Students' FCC Study Group (May 17, 1971).

[64] H. J. Levin, The Policy of Joint Ownership of Newspaper and TV Stations: Some Assumptions, Objectives and Effects (April 12, 1971).

[65] National Association of Broadcasters Reply Comments and Arguments on the Proposed Rules, Appendices B, C and D (August 18, 1971).

[66] H. Levin, Research Memorandum on the Economic and Programming Effects of Newspaper Ownership of Television Stations, Supplementary Comments at 4 (May 15, 1974).

public knowledge.[67] It finds the public in Zanesville, Ohio, a town with media "monopoly," significantly less informed than the public of a "similar" city, York, Pennsylvania, a town with a competitive media. The Institute attributes this difference to media monopoly. It is possible, however, that factors other than media monopoly contribute to or explain the results. In fact, this study highlights the difficulty of attempting to compare the performances of cross- and independently-owned stations. As Commissioner Robinson observed in his dissent:

> We ought not to assume that the kind of "goodness" we really want in a station is measured simply by diversity among different program types, the relative percentage of situation comedies, news, public affairs and the like. On the other hand, it is about the only way we can get any kind of objective handle on program quality, without getting into the business of making subjective valuations of programming content, a course that, needless to say, raises grave First Amendment problems.

Order at 1121.

(2) Effect of Common Ownership on Competition

Comparing advertising rates provides the most ready means for determining whether cross-ownership in general has an anti-competitive effect. Rosse *et al.*[68] purport to find that newspaper-owned television stations charge advertising rates 15% higher than other stations, presumably due to their monopoly position. However, their

[67] American Institute for Political Communications, Washington, D.C., 1971, The Effects of Local Media on the Mass Mind. This study was never officially filed, although the Commission discussed it in the *Order* at 1073.

[68] J. Rosse, B. Owen, & D. Gery, Economic Issues in Joint Ownership of Newspaper and TV Media (June 1, 1970).

calculations assume that audience size lacks explanatory value because it is a "dependent variable"; in other words, they assume that since advertising prices determine programming quality which in turn determines audience size, audience size cannot explain advertising rates.

In a NAB-commissioned study, Lago and Osborne challenge this assumption.[69] Employing audience size as an explanatory variable in a regression analysis, this study finds no significant difference in advertising rates. The Commission did not indicate which methodology it accepted; it merely noted that its own examinations failed to confirm Rosse's conclusion.[70] *Order* at 1073.

Apart from these studies, the Commission noted that the record did not contain evidence of specific anti-competitive acts by cross-owned stations. However, Stephen Barnett suggested before the Commission that such evidence—as well as evidence regarding the impact of cross-ownership on station performance—is available, though difficult to uncover.[71] Pointing to examples from the Commission's cases, the Litwin and Wroth report [72]

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[69] A. M. Lago & D. P. Osborne, A Quantitative Analysis of the Price Effects of Joint Mass Communications Media Ownership, RMC Report UR-150-A (March 9, 1971).

[70] The nature of this examination is not clear from the record.

[71] S. Barnett, reply comments (August 19, 1971); S. Barnett, "Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary Markle Foundation" (Sept. 23, 1974). It is strenuously contended that the latter submission was not part of the administrative record and hence should not be considered on appeal. However, as much of the report consists of discussion of cases in the public record, we see no harm in taking notice of it.

[72] *See* note 59 *supra*.

and other documented sources, Barnett described several instances where multiple-media owners had abused their power. Typical abuses were news suppression, news distortion and advertising discrimination that presumably would have been less feasible in a more competitive market.

The Commission did not mention these or other examples of abuses in its summary of the record,[73] although Commissioner Hooks noted that Barnett's position was supported by several other submissions. *Order* at 1109 (Hooks, Comm., concurring in part). The Commission's focus was on national trends, and it may have felt uncomfortable drawing conclusions about an entire industry from apparently isolated examples. However, former Commissioner Johnson has expressed the opinion that the majority of media abuses remain uncovered. *In re National Broadcasting Co.*, 19 F.C.C. 2d 713, 720-723 (dissenting opinion). In his view, this is caused by lack of written records, the difficulty of separating the elements of self-interest and news judgment, and the fact that station managers rarely resort to overt, documentable pressures.

(3) Multiplicity and Diversity of the Media.

The record contains several studies designed to measure media diversity. Sterling's study reports that the proportion of newspaper-owned broadcast stations has declined since 1950.[74] However, it examines only the top 100 markets. Furthermore, it may understate the amount

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[73] During the pendency of Docket 18110, the Commission deferred petitions to deny renewal applications alleging undue economic concentration. The Justice Department had filed several such petitions. *Order* at 1080, n.29.

[74] C. H. Sterling, Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922-1967 (March 5, 1971).

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of current concentration. In gauging concentration, radio and television stations are equated even though the Commission had noted in its notice of proposed rulemaking that TV and newspapers are by far the most powerful media sources.[75] Thus the study would show that a town originally served only by a cross-owned television-newspaper combination had become significantly less concentrated by the addition of a radio station, even if the co-located combination remained the dominant voice. Udell's study reaches a conclusion similar to Sterling's. It finds that the percentage of newspaper-owned television stations dropped from 29% in 1955 to 14% in 1969.[76] This study may simply reflect, however, the fact that the number of broadcast outlets increased during this period while the number of newspapers decreased, a finding also made by Sterling.[77]

The Seiden study attempts to measure precisely the amount of diversity in communities throughout the coun-

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[75] 22 F.C.C.2d at 346. The Litwin-Wroth study, *supra* n.59, was one study that reached this conclusion. *See also* studies cited at 22 F.C.C.2d at 344.

[76] J. Udell, Economic Consequences of FCC Proposal and Critique of Relevant Literature, submitted by the ANPA.

[77] The NAB argues that it is unnecessary and hence arbitrary for the Commission to impose restrictions on affiliations since market forces are eliminating whatever problem exists. This position is unpersuasive. First, since none of the studies demonstrates why cross-ownership has declined, continuation of the trend cannot be confidently predicted. Consequently, there is no way to predict how long it will take for cross-ownership to finally die out. More importantly, there is no reason why the Commission cannot act to accelerate a natural trend. And this argument has an ironic ring in light of the claims that divestiture would disrupt the continuity necessary for quality broadcasting.

try.[78] Choosing the Area of Dominant Influence[79] as the relevant geographic area instead of either the city, country or Standard Metropolitan Statistical Area, it counts the number of media competitors and owners that serve each area and finds that no area is served by less than thirty media owners.[80] However, the count includes numerous media that have little or no bearing on local diversity, such as newspapers from other cities and national magazines. The count contains other distortions as well. A television station and its satellites are treated as individual outlets even though they provide the same service. The Commission characterized this study as "totally unrealistic." *Order* at 1079, n.28.

In concluding its discussion of these studies, the Commission expressed doubt as to whether "counts" as such generated valuable knowledge. *Order* at 1074. Also, the Commission's brief disparages the conclusion of the Justice Department brief that the media is highly concentrated in many cities. In thirty Standard Metropolitan Statistic Areas (SMSAs) involved in this case, Justice observes, only one newspaper circulates. "In twenty others there are only two daily newspapers, and in eleven of these the newspaper which owns a television station has more than 75% of the SMSA's newspaper circulation. Computed from Rand Corporation Study R-1585-MF." And, Justice continues, "metropolitan areas which

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[78] N. H. Seiden & Associates, Mass Communications in the United States (Jan. 29, 1971).

[79] The concept of the Area of Dominant Influence (ADI) was designed by the American Research Bureau to reflect advertising markets. Every county in the continental United States is assigned to one of 204 ADI's. Seiden, *supra* n.78, at 4. An ADI thus may encompass a large geographic area.

[80] New York City showed 610 media outlets while Meridian, Mississippi, which the Commission characterized as an "egregious case," showed 109 media outlets.

in theory have several newspapers, in practice usually have only one or two with significant circulation." Br. at 20. Such figures, the Commission points out, do not establish that the broadcast industry is anti-competitive.

(4) Economic Consequences of Divestiture

The economic consequences of divestiture involves two questions: the extent to which investors themselves will be injured and the extent to which this injury will be translated into public injury. Two major studies deal chiefly with the first question, none with the second.

Commissioned by the ANPA, the Frazer-Gross study [81] and the First National City Bank study [82] both suggest most combination owners will divest their television stations, at less than current value. In particular, Frazer estimates that under divestiture conditions, TV stations will sell at 10% to 20% less than true value. In response, Justice contends this conclusion is premised on the erroneous assumption that broadcast licensees do not compete in the investment market with other non-broadcast income-producing properties.[83] Furthermore, even assuming the validity of Frazier's judgment, it does not follow that the sales price will not include a substantial profit margin.[84] Finally, since investment demand and license demand may fluctuate during the five year

[81] Frazer, Gross Associates, Valuation of Newspaper Owned TV and Radio Stations.

[82] First National City Bank, Financial and Investment Issues of Forced Divestiture.

[83] Comments of the United States Department of Justice, pp. 32-33 (1971).

[84] The Commission evidently assumed that the forced sales would be accomplished at a gain. The Commission offered to certify sales for special treatment under 26 U.S.C. 1071, *Order* at 1025, n.45, a provision only applicable to gains.

sale period, it is difficult to forecast loss figures accurately. The Commission concluded, "Our own evaluation is that the concern [over losses] may be exaggerated." *Order* at 1072.

No studies dealt with whether the public would be injured by the economic consequences of divestiture. Various comments, however, predict divestiture will produce harmful side-effects such as reductions in local ownership or the demise of marginally profitable newspapers contrary to the intent of the Newspaper Preservation Act.[85] Such suggestions are little more than speculations.[86]

B. *Whether the Commission May Properly Require a Showing of Tangible Harm to Support Divestiture*

Putting aside for the moment the question whether the Commission abused its discretion in refusing to order divestiture absent a showing of tangible public interest harm, we first consider whether the Commission's evaluation of the record was reasonable.

Despite the fact that it did not systematically evaluate the record, the Commission evidently concluded that the factual case for broad-scale divestiture had not been made. At one point the *Order* implies that the Justice Department failed to demonstrate that cross-owned stations charged anti-competitive advertising rates, *Order* at 1079 n. 27, and later it observes "it might have been necessary . . . to require divestiture in many more situations [i]f the power of the print-broadcast combination were exercised monolithically." *Order* at 1089. Also, after mentioning its power to act in the absence of documented abuses, the Commission nonetheless concluded that such "considerations are [not] a substitute for the

[85] P.L. 91-353, 84 Stat. 466 (1970).

[86] *See* text and notes at notes 94-104 *infra*.

requirement of a stronger showing than we have of the need for such a severe remedy on a broad basis." *Order* at 1080, n.29.

Furthermore, the Commission reasonably could have concluded, as it evidently did, that a compelling factual showing was unlikely to be made. The Commission not only received roughly 200 original submissions, but, when dissatisfied with the substantiality of these filings, there were 48 fresh filings in response to a detailed request. 45 F.C.C.2d 768. As a whole, the submissions suffered from what may have been unavoidable failings.[87] Diversity and its effects are, as Commissioner Robinson suggested, elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds. And the process suggested by Professor Barnett's filing did not offer much more hope of compiling a useful record. Former Commissioner Johnson has suggested that specific abuses of cross-ownership are unlikely to be apparent. And, as Judge Tamm has explained elsewhere, documentation of such abuses, "would require not only program monitoring but also perusal of reams of documentary evidence which will likely be dispersed, inaccessible and unintelligible to one who is not skilled in the intricacies of antitrust and communications law." *Hale v. FCC*, 425 F.2d 556, 565 (D.C.Cir. 1970) (Tamm, J., concurring). Furthermore, the intrusiveness involved in the very process of attempting to uncover abuses—such as news distortion—might severely strain First Amendment values.

On the other hand, the *Order* does not emphasize that the record does not support the reasons adduced for

[87] An antitrust rather than First Amendment focus might have facilitated compilation of a useful record. This does not, however, invalidate the Commission's chosen emphasis.

grandfathering either. There is virtually no evidence regarding the likelihood that divestiture would produce the harmful effects feared, or how serious any such harm would be. And the record no more establishes that cross-ownership serves the public interest than injures it.[88] After years of study, the record was essentially inconclusive.[89]

Had the evidence pointed strongly one way or another, the Commission probably would not have considered whether it should order divestiture absent a showing of tangible harm. Having concluded that the record was inconclusive, the Commission recognized that it nonetheless had the power to order divestiture. *Order* at 1080, n.29. Had the Commission reasoned that because diversified ownership is prima facie in the public interest, local cross-ownership violates the public interest, it would have been rational for it to conclude that divestiture was generally called for, subject to any appropriate exceptions. The Commission did not adopt this view, however.[90] "Di-

[88] One attempt to assess statistical studies on the effects of media concentration concluded neither side in Docket 18110 had adduced sufficient quantitative evidence to completely "prove" its case for harm or benefit. Bear, Geller, Grundfest & Posner, *Concentration of Mass Media Ownership* (RAND, Sept. 1974) at 79.

[89] The Commission evidently shares this assessment. In its brief it observes that most of the studies were inconclusive. Br. at 9, n. 6. The firmest conclusion drawn by the Commission was that an "overwhelming need" for divestiture had not been shown. The Commission did not point to items in the record that supported its decision to grandfather most stations.

[90] The most natural reading of the Commission's *Order* is that the burden of persuasion was placed on the proponents of divestiture. A strained, though possible, reading is that the burden placed on the opponents was met by the mere existence of competing policies. However, as will be shown,

vestiture," the Commission wrote, "is a harsh remedy, one to be reserved [sic] only where the need is overwhelming and the evidence unambiguous."[91] *Id.* at 1083. Thus the question before us is whether the Commission acted properly in refusing to order divestiture in the absence of a showing of tangible public interest harm.

Having evaluated the policies and record presented to us, we hold that the Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture. Divestiture, to begin with, is a misleading term in this context. It implies that the broadcaster has that which the Communications Act specifically states he does not have—an interest in the license beyond its expiration date—and that he is being forcibly deprived of a vested right. A licensee must apply for renewal of his license every three years and the Commission is to grant renewal only if it finds it is in the public interest to do so. 47 U.S.C. § 307(d).

With this in mind, it is easier to understand that even though divestiture is typically a remedy for misconduct, it is actually a much more flexible tool. Divestiture need not only be used to take the licenses from those who disserve the public interest. As with the Commission's early Chain Broadcasting and Multiple Ownership rules,[92] divestiture could be employed *to in-*

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see text and notes at notes 108-109 *infra*, the record contains no evidence anchoring the competing policies to the grandfathered combinations. Thus it would have been unreasonable to conclude the presumption against cross-affiliation had been met.

[91] Although this premise, if valid, would have supported some form of limited divestiture, it would not have supported the limited divestiture actually ordered. That is because no evidence supports the line drawn by the Commission.

[92] *See* text and notes at notes 6-8 *supra*.

crease the extent to which the broadcasting industry serves the public interest. As the Commission recognized, "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." *Order* at 1079-80. Although divestiture cannot guarantee greater diversity, it increases the likelihood that the public will be served by broadcasters with diverse views. Thus the Commission's obligation to "encourage the *larger* and *more* effective use of radio in the public interest," 47 U.S.C. § 303(g) would support the presumption that cross-owned stations do not serve the public interest.

The policies of the First Amendment also support this presumption. Because the right of access to the airwaves of some would-be broadcasters has been restricted, the public is deprived of speakers it would otherwise hear. As a result, the Supreme Court has said "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion, supra*, 395 U.S. at 390. And the interests of the public is presumed to be in maximum diversification of the airwaves. The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all." *Associated Press v. United States*, 52 F. Supp. 362, 372 (1943).

Finally, and perhaps most importantly, the Commission's long-standing policy has been that diversification of media sources is of central importance.[93] It reaffirmed this view throughout the proceeding under review. "If our democratic society is to function, *nothing* can be more important than insuring that there is a free flow

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[93] *See* text and notes at notes 6-9 *supra*.

of information from as many divergent sources as possible." *Order* at 1079 (emphasis added). Of course, the Commission probably did not intend for this and similar statements to be read literally. If if had, it presumably would not have allowed itself even to consider whether other policies ever called for waiver. But at the least, consistency would call for ordering divestiture absent a showing of greater public interest harm.

The Commission did not do this, however. Although purporting to reaffirm the primacy of diversity, *e.g.*, *Order* at 1078, the *Order* ultimately did not adopt the presumption that cross-ownership does not serve the public interest, divestiture only being ordered where "the need is overwhelming and the evidence unambiguous." *Order* at 1083. The Commission never explained that or why it had abandoned the presumption suggested in the notice of proposed rulemaking. It simply cited the existence of competing policies it claimed not to have previously considered.

The first competing value is preservation of local ownership and involvement of ownership in management. The Commission expressed fear that "many sales would have to be to outside interests." *Order* at 1078. However, as the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395-96 (1965), makes clear, local ownership by itself is of little concern to the Commission.[94] Owner management is significant because it increases the likelihood that station policy will be attuned to local needs; local ownership by itself offers no such promise.[95] And even when both are present, they are not of primary importance to the Commission. A licensee may sell its license without regard to whether the new owner intends to participate actively in management. Br. of Justice Dept. at 39, F.C.C. Reply Br. at 19 n.15.

[94] Although by its terms the 1965 *Policy Statement* applies only to comparative renewal hearings, the Commission has regarded it as an expression of general policy. *See* note 9 *supra*.

See also, Community Broadcasting Service, Inc. v. FCC, 2 FCC 2d 53 (Rev. Bd., 1966), *aff'd*, Community Broadcasting Service, Inc. v. FCC 377 F.2d 143 (D.C. Cir. 1967); Mid-Florida Television Corp., 33 FCC 2d 559 (Rev. Bd.), *aff'd* 37 FCC 2d 559 (1972), *rev'd on other grounds*, TV 9 Inc. v. FCC, 495 F.2d 929 (1973), *cert. denied* 419 U.S. 986 (1974).

In addition, the record does not support the theory that divestiture will impair local ownership and management. The Justice Department asserts and the Commission does not deny that nineteen, or roughly one quarter of the 79 newspaper-television combinations at issue, are not locally owned. In those cases divestiture may spark improvement. Furthermore, no evidence was presented that the local owners of the other stations are actively involved in daily management. Since "[m]ost of the parties state that their broadcast stations and newspapers have separate management, facilities, and staff. . ." *Order* at 1059, it may be that owner management is unusual. Finally, there is no reason to suppose that local entrepenuers will not find television an attractive investment.[96]

[95] "We are primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." 1965 *Policy Statement, supra*, 1 FCC 2d at 395.

[96] *See* text accompanying note 102 *infra*. An argument evidently rejected by the Commission is that because large stations are so expensive, divested stations would be purchased primarily by group owners who would thereby accumulate undue power. It is not clear that this chain of events would transpire. And in any event, non-concentrated group ownership might constitute an effective bulwark against the power of the networks. *See Bazelon, FCC Regulation of the Telecommunications Press*, 1975 DUKE L. REV. 213, 238.

The second fear is that divestiture might disturb "continuity of operation . . . as the new owner would lack the long knowledge of the community and would have to begin raw." *Order* at 1078. As support, the Commission brief cites judicial decisions giving recognition to the fact that "legitimate renewal expectancies are implied in the structure of the Communications Act" Rep. Br. at 15. The goal of certainty is to give broadcasters an incentive to make the investment required to produce quality programming. Whatever the legitimate strength of this policy in light of the statutory limitation on the interest in a license,[97] it has scant force in this case. A one-time alteration in the ownership structure of the broadcast industry should not effect the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity.[98] Furthermore, to the extent the Commission means that transfer of ownership is by itself disruptive, its position is at odds with its practice of routinely approving license assignments.[99] Finally,

[97] "No such license shall be construed to create any use beyond the terms, conditions and period of the license." 47 U.S.C. § 301. *See* Fidelity Television, Inc. v. FCC, 515 F.2d 684, 705 (Bazelon, C.J., statement as to why he voted to grant rehearing en banc), (D.C. Cir. 1975).

[98] Of course, the public interest would be affected if the old licensees were "better" than their replacements. But the Commission cites no reason to believe that the new licensees will, in the long run, be inferior.

[99] There is some dispute regarding the number of transfers routinely approved by the Commission. Justice asserts that in the six years prior to the *Order*, the Commission approved without hearing 678 license assignments. Br. at 42. The Commission replies that almost 60% of these were pro forma assignments, such as "transfers to relations because of death, minority stock." Re Br. 18. Even assuming that such transfers are inconsequential, the number of other transfers suggests that "disruption" is not ordinarily a major concern for the Commission.

even if transfer to non-local owners entails extraordinary disruption, there is no basis for assuming that such transfers will result from divestiture.[100]

The final fear is that "[l]ocal economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too." *Order* at 1083. Although it is not entirely clear, the Commission presumably was not concerned with financial hardship to the individual owners.[101] Private losses are a relevant concern under the Communications Act only when shown to have an adverse affect on the provision of broadcasting service to the public. *Federal Communications Commission v. Sanders Radio Station*, 309 U.S. 470, 474-76 (1940); *Carroll Broadcasting v. F.C.C.*, 258 F.2d 440 (1958). Yet, as Commissioner Robinson theorized in his dissent, *Order* at 1127, divestiture should not even produce substantial *private* losses. Most cross-owned stations are held by their original owners who by now have long recouped their original investment. *Order* at 1130.[102]

[100] Commissioner Robinson pointed out that holdovers in high-level management often smooth the transition period. "Indeed, any other action by the new licensee would only reduce the value of his franchise." *Order* at 1128.

[101] There are, however, passages that suggest that this was the Commission's concern. "[D]ivestiture introduces the possibility of . . . hardship for individual owners." *Order* at 1078. In addition, the Order suggests that because some combinations were formed when broadcasting was not profitable, it would be unfair to deny continued operation to those owners now that it is. To the extent such a policy underlies the Commission's decision, it is impermissible. Licensing is to be in the public, not private interest.

[102] Commissioner Robinson noted that some more recently formed combinations might not have yet returned their original investment. With respect to these, he concluded, "I am unwilling to assume that the public interest compels us to

In its brief, the Commission claims that its concern was the effect divestiture would have on future programming. It reasoned that because broadcasting stations are expensive, new owners would have insufficient working capital to finance news and other public affairs programming. Rep. Br. at 20. But presumably this would also be the case in voluntary transactions, which the Commission readily permits. A different public interest injury that might result from separation is the failing of marginal newspapers no longer supported by affiliated broadcast stations.[103] However, the Commission did not rely on this point and, as Commissioner Robinson pointed out, the record contains no reliable information on the degree to which stations subsidize newspapers. *Order* at 1129.[104]

In sum, the Commission could not have rationally concluded that the competing policies it offered justified grandfathering absent a show of harm. And, since the record does not disclose the extent to which divestiture would actually threaten these values, the Commission could not have rationally concluded, if it did, that their potential impairment overcame the presumption against

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ratify the licensee's expectation that its three-year license constitutes a perpetuity which should not be revoked when other, and weighty, public interest considerations may require it." *Order* at 1130.

[103] It is often assumed that the demise of the *Boston Herald* was caused by the revocation of the license of its wholly owned subsidiary, WHDH TV. Order at 1107 (Lee, R., Comm., concurring).

[104] Furthermore, if it appeared likely that a newspaper would fail as a result of divestiture, the Commission could reasonably conclude that the public interest called for waiver. *See* International Shoe Co. v. FTC, 280 U.S. 291, 302-303 (1930).

cross-ownership.[105] The gains in diversity from divestiture may be speculative, but since divestiture is the most promising method for increasing diversity that does not entail governmental supervision of speech,[106] the Commission could not rationally conclude that lesser policies, lacking support in the record, require maintenance of the status quo.[107] "In passing upon considera-

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[105] Terre Haute Broadcasting Co., 25 FCC 2d 348, 353-55 (1970); Policy Statement on Comparative Broadcast Hearing, 1 FCC 2d 393, 394 (1965). *See* WHDH, Inc., 16 FCC 2d 1, 12-13 on recon., 17 FCC 2d 856 (1969), *aff'd* Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 444 F.2d 841, 859-60 (1970), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2229, 29 L. Ed. 2d 701 (1971); Lorain Community Broadcasting Co., 13 FCC 2d 106, 114, recon. denied, 14 FCC 2d 894, rehearing denied, 15 FCC 2d 388 (1968), review denied, 18 FCC 2d 686 (1969), *aff'd*, Allied Broadcasting, Inc. v. FCC, 140 U.S. App. D.C. 264, 435 F.2d 68, 69 (1970); Ultravision Broadcasting Corp., 11 F.C.C. 2d 394, 410-11 (1968); *aff'd*, WEBR, Inc. v. FCC, 136 U.S. App. D.C. 316, 420 F.2d 158 (1969). *See generally* TV 9, Inc. v. FCC, 161 U.S. App. D.C. 349, 495 F.2d 929, 938 (1973), *cert. denied*, 419 U.S. 986, 95 S. Ct. 245, 42 L. Ed. 2d 194 (1974).

[106] *See* text accompanying notes 30-32 *supra*.

[107] Justice offers as a separate grounds for reversal the Commission's failure to accord greater weight to antitrust considerations, particularly competition for advertising revenues. Although antitrust policy is relevant to the "public interest, convenience, or necessity" standard, as the Commission recognized it is only one component of a broader mandate. *Order* at 1079. United States v. Radio Corporation of America, 358 U.S. 334 (1959); Northern Natural Gas Co. v. FPC, 399 F. d 953 (D.C. Cir. 1968). In deference to the strong authority in support of this proposition, Justice now claims the Commission should have given the antitrust laws "prima facie effect." However, the Commission was well within its discretion on rejecting Justice's suggestion, regardless of its label.

tions open to the Commission even on an application for renewal of a license this court has taken a stand against heavy reliance on the status quo." *TV 9, Inc. v. F.C.C.*, 394 F.2d 929, 937 (D.C.Cir. 1973).[108]

In any event, even if the Commission's chosen presumption were supportable, its current policy could not stand. First, the record does not support the conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets. Nor does it show that the need for divestiture in the affected markets is "overwhelming" and the evidence "unambiguous." Although the affected markets contain

[108] The *Order* not only leaves the status quo largely intact, it solidifies the position of existing combinations by making petitions to deny more difficult. Without reasoned discussion, the Commission has abandoned its former policy of allowing petitioners to deny the opportunity to demonstrate in any one of several ways that cross-ownership harms the public interest. *See* note 21, *supra*. The Commission's decision to substitute an antitrust standard for this open-ended test is inconsistent with the *Order's* emphasis on First Amendment considerations. Furthermore, it unreasonably curtails the interests of petitioners to deny. The Commission's decision to grandfather as the rule rather than the exception was based largely on its conclusion that the rulemaking record did not contain evidence documenting the harmful nature of cross-ownership as a general matter. Had this policy been supportable, it would have been logical for the Commission to encourage showings of harm in individual markets, rather than effectively to prohibit it. In fact, the Commission itself seems to recognize the deficiencies of this standard. The Commission recently set for hearing the renewal of WGAL-TV, exclusively on the issue of cross-ownership "abuses" that do not constitute violations of the antitrust laws. Renewal of WGAL-TV, 39 RR2d 457 (1976). In passing, the Commission noted that it has neither the "expertise" or "experience" to enforce the antitrust laws and that it would be "inappropriate" for it to duplicate the functions of those agencies that are expert, *id.* at 463.

fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater. The Commission "must do more than enumerate factual differences, . . . it must explain the relevance of those differences to the purposes of the Federal Communications Act." *Melody Music v. F.C.C.*, 345 F.2d 730, 733 (D.C.Cir. 1965).

Finally, limiting divestiture to small markets of "absolute monopoly" squanders the opportunity where divestiture might do the most good. There is no apparent technological reason why additional broadcasters could not be licensed in many of the smaller markets.[109] In many large markets, on the other hand, newspapers possess highly coveted VHF licenses.[110] Divestiture thus may be more useful in the larger markets. The Commission's arbitrary cut-off at one independent in-coming signal prevents realization of such gains.[111]

Conclusion

Although we do not disturb the Commission's prospective rules, we conclude that the divestiture order is inconsistent with its longstanding policy that "nothing

[109] Because of geographic proximity, the Commission cannot always assign the maximum number of frequencies to each city.

[110] "Currently, nearly every available VHF frequency is assigned and in use, ..." Federal Regulation and Regulatory Reform, Report of the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Dec. 6, 1976.

[111] This is not to say that the Commission's focus on local news was improper. That focus seems entirely appropriate in light of the number of media voices concerned with national affairs.

can be more important than insuring that there is a free flow of information from as many divergent sources as possible." The Commission has sought to limit divestiture to cases where the evidence discloses that cross-ownership clearly harms the public interest. For the reasons expressed above, we believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.[112] Accordingly, we vacate such portions of the *Order* that have retroactive effect and remand the record to the Commission for adoption of a rule not inconsistent with this opinion.

It is so ordered.

[112] Such cases could be accommodated through a waiver procedure. The *Order* contains an excellent discussion of the circumstances in which such waivers might be appropriate. *See Order* at 1085.

Appendix B

FCC 75-104

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 73.34, 73.240, AND 73.636 OF THE COMMISSION'S RULES RELATING TO MULTIPLE OWNERSHIP OF STANDARD, FM, AND TELEVISION BROADCAST STATIONS	Docket No. 18110

SECOND REPORT AND ORDER*

(Proceeding Terminated)

(Adopted January 28, 1975; Released January 31, 1975)

BY THE COMMISSION: COMMISSIONERS LEE, REID, AND WASHBURN CONCURRING AND ISSUING STATEMENTS; COMMISSIONERS HOOKS AND ROBINSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING STATEMENTS; COMMISSIONER QUELLO ISSUING A SEPARATE STATEMENT.

1. The Commission has before it the *Further Notice of Proposed Rule Making* in this proceeding (22 F.C.C. 2d 339 (1970)) and responsive filings by numerous parties. Also under consideration are updated written filings and additional information presented during two and a half days of oral argument, pursuant to an invitation of the Commission given March 7, 1974 (45 F.C.C. 2d 768). A list of filing parties appears in Appendix A.

2. The proceeding began March 27, 1968, with the adoption of a *Notice of Proposed Rule Making* (33 Fed. Reg. 5315). Broadly speaking, the notice proposed rules proscribing common ownership of broadcast stations in different broadcast services in the same market (i.e., no common ownership of TV–AM, or TV–FM, or AM–FM.)[1] The proposed rules were prospective in nature, i.e., they did not contemplate divestiture of existing facilities but were to apply only to applications to construct new facilities or to acquire existing facilities.

3. A *First Report and Order* was adopted on March 25, 1970 (22 F.C.C. 2d 306). The rules promulgated therein were modified somewhat in a *Memorandum Opinion and Order* adopted February 26, 1971

*A synopsis of the actions taken can be found in Appendix G.

[1] Before the proceeding was initiated, the rules governing common ownership of broadcast stations in the same market prohibited such ownership in the *same* broadcast service if certain coverage contours overlapped. They permitted common ownership of stations in *different* broadcast services in the same market. Hence a single licensee was permitted to own an AM–FM–TV combination licensed to serve the same community. Moreover, the rules contained no prohibition of common ownership of newspapers and broadcast stations in the same market. However, as a matter of policy expressed in the Commission's multiple ownership rules and elsewhere, the Commission did examine concentrations of ownership in the same geographic area on an *ad hoc* basis in both comparative and non-comparative situations. These examinations gave consideration to broadcast and non-broadcast interests, such as newspapers.

(28 F.C.C. 2d 662), which disposed of petitions for reconsideration of the *First Report and Order*. These new rules prohibited common ownership of VHF television stations and aural stations in the same market. They permitted AM–FM combinations and they provided that all applications involving common ownership of UHF and aural stations would be treated on a case-by-case basis. They did not require divestiture, but did require that if the owner of a VHF station and one or two aural stations in the same market sold, he could not sell the TV and the aural stations to the same party. They did not cover common ownership of newspaper and broadcast stations.[2]

4. On the same date that the *First Report and Order* was adopted, the Commission also adopted a *Further Notice of Proposed Rule Making* (22 F.C.C. 2d 339) which contained a proposal as to common ownership of broadcast stations and of daily newspapers and broadcast stations in the same market. The proposal would require divestiture, within five years, to reduce one party's holdings in any market to one or more daily newspapers, or one television broadcast station, or one AM–FM combination. Under the proposal, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned in that market within one year or by the time of its next renewal date, whichever is longer. No grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market. Comments were also invited on whether divestiture should be required with regard to AM–FM combinations so that no party could own such a combination unless he had made a showing that the two stations were for economic or technical reasons so interdependent that one could not be sold without the other.[2]

5. Although not unprecedented, the idea of divestiture of ownership was a departure from the typical Commission approach of limiting any new rules to prospective effect. As a consequence of the incorporation of this facet of the proposal, the question of the impact on industry structure was introduced. Moreover, because of the differences between prospective and retrospective proposals, each needs to be examined separately and tested against appropriate criteria.

6. *Response to the Proposal.* As could be expected, our proposal generated a great deal of interest and provoked a sizable number of

[2] Under these rules, a TV station and an AM station were considered to be in the same market if the Grade A contour of the TV station encompassed the entire community of license of the AM station or if the 2 mV/m contour of the AM station encompassed the entire community of license of the TV station. With regard to TV and FM stations, the Grade A contour was used for TV and the 1 mV/m contour was used for FM. As to AM–FM combinations, they were considered to be in the same market if the 1 mV/m contour of the FM station encompassed the entire community of license of the AM station or if the 2 mV/m contour of the AM station encompassed the entire community of license of the FM station. With certain exceptions, the *First Report and Order* proscribed the formation of new AM–FM combinations in the same market and prohibited the sale of such an existing AM–FM combination to a single party unless a special showing were made that for technical or economic reasons the stations had to be operated in combination. The aforementioned *Memorandum Opinion and Order* (at 670–672) reversed the prohibitions against forming AM–FM combinations or selling existing combinations to a single party. In so doing it indicated that the subject of common ownership of AM and FM stations in the same market would be explored in the phase of the proceeding commenced by the *Further Notice of Proposed Rule Making*. It also indicated that, as an effective alternative to diversification of ownership, the Commission intended to explore the possibility of amending the AM–FM program duplication rule (§ 73.242) in such a way as to provide more non-duplicated programming over commonly owned AM and FM stations in the same area. A proceeding has since been begun to explore this possibility (*Notice of Proposed Rule Making*, Docket No. 20016, 39 Fed. Reg. 14228 (1974)).

filings. Most were directed to the question of newspaper-broadcast ownership, with most parties opposing rule changes but a number supporting them. Some approached the issues from the point of view of anti-trust economic analysis; others stressed the diversity of viewpoint aspect. In addition, some parties discussed AM–FM combinations or television-radio combination divestiture.

7. Factual differences between situations also affected the nature of the views expressed in a filing. Thus, for example, as to newspapers, at one end of the continuum was the daily newspaper-television combination which faced multiple competitors of both media, and at the other end was the joint holding of the only TV station and daily newspaper in a market. Whether in terms of economics or viewpoint diversity, parties differed on the weight to be given other media (for example news magazines) received in the market but originating elsewhere. So too with the weight to assign other local media such as weekly newspapers and outdoor advertising or direct mail. Although important factual differences were noted, a parallel method of evaluating the situation regarding daily newspaper-radio combinations could be found in the pleadings.

8. *Legal Authority.* The *Further Notice* (at para. 48) invited comments or legal briefs on the Commission's authority to adopt the proposed rules. Several parties responded to this invitation concisely or at length. We have concluded that we have authority to adopt the rules both as proposed and as promulgated by the present document. A discussion of this subject follows:

9. The Commission has authority to adopt rules governing the issuance of broadcast licenses which would prohibit cross-ownership of newspapers and broadcast stations in the same area in furtherance of our long standing policy of promoting diversification of ownership of the electronic mass communications media. Statutory authority is found in Sections 2(a), 4(i), 4(j), 301, 303, and 309(a) of the Communications Act of 1934, as amended. Section 309(a) specifically requires the Commission to find that the granting of a license serves the public interest, convenience, and necessity. The term public interest encompasses many factors including "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

10. Our diversification policy is derived from both First Amendment and anti-trust policy sources. See, e.g., *Associated Press* v. *United States*, 326 U.S. 1 (1945), *supra*, affirming 52 F. Supp. 362 (S.D.N.Y. 1943) (L. Hand, J.); *Citizens Committee to Save WEFM* v. *FCC*, —— F. 2d ——, (D.C. Cir., Oct. 4, 1974), (concurring opinion of Bazelon, C.J. at 6). The Federal Courts have consistently upheld our use of these grounds in efforts to promote diversity of control over the electronic media of mass communications. In its earliest opinions construing the Communications Act, the Supreme Court recognized that regulation of broadcasting was designed to preserve competition and prevent monopoly. *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474–76 (1940). The Supreme Court said in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390: "It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization

of that market, whether it be by the Government itself or a private licensee". The Court then concluded: "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at p. 390. In *Mt. Mansfield TV Inc.* v. *FCC*, 442 F. 2d 470 (2nd Cir. 1971) the Court upheld our prime time access rule as being consistent with our obligations under the First Amendment to promote diversity of program sources.

11. Although the Commission is not empowered to enforce the anti-trust laws, it may properly take cognizance of anti-trust violations and anti-trust policy in performing its public interest licensing function. *United States* v. *RCA*, 358 U.S. 334 (1954). In expanding on this point in RCA, the Supreme Court said in dicta:

> Moreover, in a given case the Commission might find that anti-trust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication. See 98 Cong. Rec. 7399; *Mansfield Journal Co.* v. *FCC*, 86 U.S. App. D.C. 102, 107, 108; 180 F. 2d 28, 33, 34.

Anti-trust policy has been recognized as a correlative source of authority for our diversification policy because requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices. However, these two sources of our diversification policy are not always present to the same extent nor do they apply with equal force in every case. Our prospectively-applicable rule with respect to future newspaper-broadcast combinations in the same city draws its support principally from our First Amendment concern. Our divestiture order applied to "egregious" cases in which the only newspaper and the only broadcast station in a city are co-owned is founded upon both concerns. While we have proceeded by a different course than one based strictly on a market analysis, the fact is we have in effect used a geographic market in writing our new rules and have considered daily newspapers and stations as part of the same product market.

12. In November 1953 we adopted rules limiting the number of broadcast stations a person could own to five VHF television stations and seven AM and FM stations. We asserted authority to make regulations limiting concentration of stations under the same control. The United States Supreme Court upheld these regulations in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

13. In recent rule making proceedings the Commission has adopted rules prohibiting networks from having any cable interests and telephone companies from owning cable systems in their service areas. The Courts accepted our action in both instances. *Iacopi* v. *F.C.C.*, 451 F. 2d 1142 (9th Cir., 1971); *General Telephone Co. of the Southwest* v. *U.S.*, 449 F. 2d 846 (5th Cir., 1971).[3]

[3] The issue in *Iacopi* was whether a divestiture plan complied with our rules rather than a direct attack on the validity of the rule itself. However, the Court did say: "The Commission has determined that network divestiture of CATV and syndication interests will increase competition and foster independent sources of TV programming. We defer to that interpretation." 451 F. 2d at 1147. See also the concurring statement of Judge Tamm of the United States Court of Appeals for the District of Columbia. "The pending rule making proceedings (Docket No. 18110) offer some hope that the Commission will finally come to grips with the grave problem inherent in the rising concentration of ownership in the mass media." *Hale* v. *F.C.C.*, 425 F. 2d 556, 566 (D.C. Cir., 1970).

14. The sound public policy of placing into many, rather than a few hands, the control of the broadcast medium guides us in the licensing of the use of the radio spectrum. This basic principle, enforceable in *ad hoc* proceedings or through rule making, applies to the judgment of whether an individual application should be granted as well as to the comparison of competing applicants. *United States* v. *Storer Broadcasting Co.*, *supra; Clarksburg Publishing Co.* v. *F.C.C.*, 96 U.S. App. D.C. 211, 225 F. 2d 511 (1955); *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 89 U.S. App. D.C. 13, 189 F. 2d 677 (1951), *Cert. den.* 342 U.S. 830; *Plains Radio Broadcasting Co.* v. *FCC*, 85 U.S. App. D.C. 48, 175 F. 2d 359 (1949). It is the policy behind our one-to-a-market rules adopted in the *First Report and Order, Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 F.C.C. 2d 306 (1970). The significance of ownership from the standpoint of "the widest possible dissemination of information" lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest.

15. Despite the overwhelming authority supporting our proposed action, numerous parties have challenged our jurisdiction to take any action interfering with the rights of newspapers to own broadcast stations. The American Newspaper Publisher's Association (ANPA) advanced the major legal arguments against such a rule in their exhaustive and comprehensive filings with the Commission.

16. They first challenge our authority on constitutional grounds citing the First and Fifth Amendments to the United States Constitution. ANPA claims we are attempting to inhibit a newspaper owner's freedom to publish by preventing him from having an interest in broadcast stations. This argument fails for two reasons. First, the Commission is following the long established policy of promoting the widest possible dissemination of information from diverse and antagonistic sources . . ." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). Second, the First Amendment does not protect business relations that are either unlawful or not in the public interest. Finally, we believe the opponents overstate their case in this and in the other arguments. The Commission has never proposed and is not now proposing to prohibit someone from owning a newspaper and a television station. It is plain that what we are doing is grandfathering present newspaper-television owner combinations; we are only requiring divestiture in egregious cases (see Appendix D and paras. 112–122, *infra.*) These divestitures are to take place over a five-year period and in order to avoid any possible future harm, we shall entertain waiver petitions.

17. ANPA contends such rules violate the Fifth Amendment because we are discriminating against a class. Rules that treat in an equal manner all parties whose activities raise similar public interest problems are not discriminatory. Since broadcast licenses confer no property rights, the Commission may cancel them provided it affords due process to the licensee. *Radio Commission* v. *Nelson Bros. Radio*, 289 U.S. 266 (1933). Discrimination is by definition, the arbitrary and capricious classification of entities by irrelevant standards. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). We need not confer licenses on a carefully

defined class provided that we determine our action is consistent with the public interest.

18. The ANPA brief also cites an opinion by former General Counsel Hampson Gary, written in 1937, purporting to hold the Commission cannot deny a broadcast license to someone solely on the ground they published a newspaper. That opinion is not relevant to the consideration of Docket No. 18110 for four reasons. First, it was written in the context of a comparative proceeding. Second, it dealt with the broader question of *any* newspaper as opposed to the more limited consideration of one city. Third, prior statements by a regulatory agency as to its jurisdiction are not determinative of the legality of subsequent efforts to assert the same jurisdiction.[4] Finally, the problems of cross ownership and concentration of media ownership are much different in 1974 than in 1937.

19. The opponents of the adoption of the rules have called to our attention several attempts by Congress in the early fifties to prohibit the Commission from "discriminating" against newspaper owners in license proceedings. They contend Congress failed to enact legislation because of assurances by the Commission that it had no intention of "discriminating."

20. The opponents are apparently referring to then Chairman Hyde's testimony during hearings on the 1952 Amendments to the Communications Act. In view of the fact that the Commission prior to this testimony had taken newspaper ownership into account in denying applications, *Scripps-Howard Radio, Inc.* v. *FCC*, *supra* and *Plains Radio Broadcasting Co.* v. *FCC*, *supra*, the then Chairman's testimony could not have reasonably been taken as an indication that newspaper ownership by a potential licensee was of no concern to the Commission. It is also clear that an agency's view of the extent to which its public interest mandate requires it to take newspaper ownership into account can change over the years. Thus, the Chairman's testimony in 1952 concerning the Commission's views on what policy best serves the public interest does not mean that the agency is excused from its continuing responsibility to seek to further the public interest which may cause it to reach a different conclusion twenty-two years later. Finally, it should be noted that our proposed action does not bar newspapers as a class from becoming licensees. We merely propose to prevent common ownership in the same area. Thus, we believe it is impossible to discern any mandate from either Congress' action or inaction.

21. Several Court cases are cited in support of our lack of authority to promulgate these rules. In *Tri-State Broadcasting Co.* v. *FCC*, 96 F. 2d 564 (D.C. Cir., 1938) the court stated it knew of no rule or statutes prohibiting a newspaper from owning a radio station. We fail to see how this justifies a ban on our promulgating such a rule. ANPA relies most heavily on *Stahlman* v. *FCC*, 126 F. 2d 124 (D.C. Cir., 1942). That case upheld our authority to issue a subpoena as part of our investigatory powers. It also contained considerable dicta such as "there is nothing in the Act which either prevents or prejudices the

[4] See e.g., *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 169–170 (1968). The Commission once had doubts about its own jurisdiction in the field of CATV but changed its position in the mid-sixties.

right of a newspaper, as such to apply for and receive a license to operate a radio broadcast station." 126 F. 2d at 127. This statement deals with newspaper owners in general and is not related to the issues in this proceeding. Judge Edgerton noted in a concurring opinion that the court was not deciding the issue of crossownership.

22. ANPA also cites the case of *McClatchy Broadcasting Co.* v. *FCC*, 239 F. 2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) where a newspaper owner seeking a television station in the same city lost in a comparative proceeding. The Court said newspaper ownership was not a *disqualifying* factor standing alone but the case did not deal with that issue in a rulemaking proceeding.

23. Finally, the opponents have said we do not have authority to order immediate divestiture and that even if we did, such a remedy is so harsh it should be sparingly used. This argument begs the question. The Commission has a very unusual licensing scheme in that, unlike other agencies, we must re-evaluate each license every three years. We cannot renew a license unless we determine that to do so is in the public interest. In this connection we have determined that in certain egregiously concentrated markets the public interest requires divestiture. However, we have applied the divestiture over a five-year period in order to minimize disruption.

COMMON OWNERSHIP NOT INVOLVING NEWSPAPERS[5]

24. *The Arguments.* Most of what little discussion there was on the subject of common ownership of broadcast stations in the same market was opposed to prohibitions on AM–FM combinations or divesting any existing radio-television combinations.

25. Because of the Commission's decision to focus on the subject of newspaper-television combinations at the oral argument, most of the parties gave little attention in their recent filings to the other matters which had been included for consideration in the proceeding. A number did mention their agreement with the Commission's decision to give principal attention to the subject of newspaper-television combinations. Many thought that, in addition to not posing problems from a diversification point of view, existing radio-television combinations or AM–FM combinations served an important function. Particularly emphasized was the need of an FM station to rely on an existing AM station in order to underwrite the losses which were sustained while the companion FM station was being established. A similar point was made regarding the cash flow radio stations generate which could be relied upon by a fledgling UHF television station. From a philosophical point of view, too, there was support for permitting such combinations. The main thrust in that regard was that there was no basis for believing that coownership of radio and television stations in a locality was detrimental to the public interest. In effect, these parties took the position that absent a persuasive showing of harm, there was no reason for the Commission to act to terminate such common ownership. Overall the networks pointed to the im-

[5] A few parties mentioned radio-television as well as AF–FM combinations and their comments are included in this section.

portance of the owned and operated stations to the network operations. ABC and CBS stressed the importance of permitting existing radio ownership to continue, particularly in terms of the negative impact on network radio operations that a splitting of common ownership would have. NBC asserted that existing radio-television combinations should be transferable jointly.

26. A notably different point of view was expressed in the joint filing on behalf of the Civil Liberties Union of Alabama and The Selma Project. Quoting the Commission to the effect that a public interest basis need be shown in order to overcome the importance of diversification which would otherwise call for separate ownership, this pleading urges the separation of AM and FM station ownership. They see no basis for giving different treatment to ownership of an AM and FM station in a locality from that given ownership of two AM or two FM stations there. While acknowledging the advantage that increased non-duplication (as proposed by the Commission) would have in terms of ending waste of spectrum space, they nevertheless insist that two, separately programmed, stations under common ownership do not advance the cause of diversity. In their view, diversity is most important in the smallest of communities where the nonduplication rule may not even be applied, for it is there that choices are usually most limited. Nor do they find persuasive the argument that there would be a resultant diminution in the quality of radio programs if ownership of AM and FM stations were separated. Not only do they believe that independent FM stations could do just as well, they discount the notion that much current programming has any real merit. Finally, they contend that continuation of AM–FM combinations would effectively preclude minority group ownership.

27. Westinghouse believes that newspaper-television ownerships are a more significant problem than aural-visual ownerships, and that aural-visual separation would disrupt and downgrade service. Cosmos Broadcasting Corp. agrees with the view that there is no need for divestiture of commonly owned radio and television stations and that TV-newspaper ownerships are the more significant aspect of the diversity problem, because other broadcast services are "substantially less significant" sources of news and public affairs information.

28. Affected parties argue that broadcast stations in Alaska are in a unique economic situation which is caused by the isolation and distance of Alaska from the mainland of the U.S., the limited and sparse population of the State and the need for quality service. In addition, they assert that the operating costs of Alaskan stations are higher because all supplies must be shipped a long distance from the lower 48 states and that living costs in Alaska are also much higher than the average in the U.S., resulting in higher wages and salaries, the single highest expense item in operating a broadcast station. TV Broadcast Financial Data for the year 1973 for the city of Anchorage (the only Alaskan city covered by the reports) show that the figures for the three television stations showed an operating loss of $718,673. Similarly, the FCC data on AM and FM stations indicate that in 1972 Alaska was the only state where the radio stations as a whole reported a loss for the year.

29. Not only Alaska but stations in Montana should also be exempt from the proposed divestiture rules we are told. The argument is that Montana is a large, sparsely populated State with a depressed economy which, nevertheless, has to absorb costs of construction and operation which are as high in Montana communities as those in larger markets. Thus, it is asserted, being able to split the costs between television and radio stations contributes to profitability and stability. Divestiture, it is said, would not necessarily increase diversity, for in one particular market one of three assigned VHF channels is inactive, one of three FM channels is inactive and both assigned UHF channels are inactive.

30. *Conclusions.* The issues presented by joint ownership of radio and television facilities in a given market have already been partially resolved. The present rules adopted in an earlier phase of this proceeding bar the creation of such combinations but they do not require separation of existing ownership except through sale to separate owners when they are in fact sold. We were offered no basis for taking any action to divest any existing combination, nor do we see any such basis for requiring divestiture in the larger markets. Moreover, we do not believe that we need to follow the policy of separating ownership in smaller markets as we have been urged to do. In reaching our decision in this regard we examined all cases where one party owned the only television and the only radio stations in a community. In all instances [6] save one, there was at least one city-grade signal from outside that encompassed the city. Separately owned daily newspapers also served some of the communities. As with the newspaper aspect of this proceeding, we considered this sufficient to demonstrate the presence of a full-fledged competitor and hence that no divestiture was required. As to the remaining case, Zanesville, Ohio, where there is no encompassment, the licensee has sold its daily newspaper and it too faces a full-fledged competitor. Accordingly, we shall not make any change in the standards applicable to this aspect of multiple ownership.

31. While it was not the principal focus of the current section of this proceeding, the subject of AM–FM combination ownership is properly before us and in need of resolution. Three major avenues are open. We could act to bar only future combinations, could seek to end existing combinations as well or could act instead through a non-ownership method. There can be no question that wholesale disruption would attend any effort at divestiture. Even if it could be demonstrated (and this record in no way does so) that this would not be an insuperable obstacle, other impediments remain. The state of FM has indeed improved over the years, but much has been due to the pioneering efforts of AM licensees who were encouraged by us to enter the FM market. More than this, it is by no means clear that FM stations can yet be expected to stand on their own.[7] Some of course do but many cannot.

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[6] In our view the situation in Alaska is unique and we agree with the arguments expressed earlier on the need to exempt stations there. Also, the list of monopolies excludes satellite stations as they are not full-fledged stations themselves and are vulnerable to challenge by a party wishing to operate independently. The very fact they are not now independent suggests that the locality cannot support competing services.

[7] In the non-duplication notice of proposed rule making (mentioned at the end of footnote 2) we reported on our observations regarding recent developments in the economic position of FM stations. In essence, the data support the idea of separation of programming but fall short of demonstrating that all FM stations can stand on their own.

Unlike the program duplication question addressed later, separation of ownership ends all economies of scale.[8] Whether prospective or retrospective, we do not believe that a separation of ownership is consonant with the current state of the medium. Divestiture could silence a number of stations or leave them too financially weak to offer full service. Even prospective rules could slow growth in FM broadcasting. This is not to say that the idea of diversification is of no importance, but it does not depend on such a barrier to all combinations. Rather, if a license for an unused FM channel is worth seeking, others besides AM licensees will step forward, and under our 1965 Policy Statement on comparative hearings, diversification is the most important single issue governing the choice of who is to succeed in a hearing. Thus, the new, non-multiple owner, entrant has a real advantage. On the other hand, where none steps forward, there is a real reason to doubt that the situation would be different if a prospective barrier existed. Thus, the major effect of any such rule would be to stunt growth where it is most needed and only an AM licensee is ready to proceed or to do the really unnecessary where others already have an interest and a distinct advantage in a hearing. With this in mind, we put the issue to rest and shall not adopt rules in this area.[9]

32. What then of the "single aural service" concept? Does the above discussion portend a change in the Commission's view? The answer is no. The fact that we are not proceeding now to divorce AM and FM ownership does not indicate that other appropriate steps to further our policy goals are not warranted. Just as we have taken the presence or absence of FM station coverage into account in the new AM allocation rules,[10] so can we proceed in furtherance of the policy in the area of program non-duplication. We have expressed the view that simultaneous presentation of identical programs on two stations in a community is wasteful of scarce spectrum space. Even if separation is not feasible, extension of non-duplication restrictions may well be. Clearly, if this is done, more program choices will be available to the listener. While no decisions have yet been made on how to resolve the issues raised in the non-duplication proceeding, it is clear that such action as is appropriate in the area of AM–FM combinations should come through such means. Therefore, we shall not adopt rules to bar future AM–FM combinations when the result would be to affect, in many instances, the places where separate FM operation is least likely. Unless there were wholesale divestiture of existing AM–FM combinations, a future prohibition would only require separate ownership of the channels least likely to be viable under separate operation. Only extensive divestiture would provide for separate ownership of just those channels most likely to be worthwhile separately. Even if this makes sense theoretically, the cost would be too high, the cure worse than the disease.

[8] E.g., use of common studio, same staff, side mounting of FM antenna on AM tower.
[9] Since such a conclusion must as always rest on the facts then obtaining, it does not necessarily follow that there never would be a time when separation is necessary. If such a time occurs, we can act; it is clearly not now.
[10] 39 F.C.C. 2d 645 (1973).

NEWSPAPER OWNERSHIP—ECONOMIC CONSEQUENCES

33. Much of the discussion relating to daily newspaper-television station common ownership in the pleadings was approached from the point of view of anti-trust considerations. To aid in understanding the nature of the questions thus presented the succeeding paragraphs in part follow an anti-trust oriented arrangement. In addition, a number of pleadings were directed to the question of diversity of viewpoints as it related to newspaper-broadcasting common ownership. These arguments will be discussed separately.

34. *Relevant Product Market.* When the possibility of garnering too large a share of the market suggests that an anti-trust issue may be raised, there are two initial aspects to consider. The first is the product line or the line of commerce in an economic sense. Sometimes there are difficulties in establishing what is the market because of the dispute which exists regarding the substitutability of products. To give an example: if a steel company seeks to acquire an aluminum company, does this constitute a form of horizontal integration leading perhaps to impermissible oligopolistic concentration? To answer the question requires among other things a determination of the relevant product market, and, in this example, a knowledge about the conditions under which aluminum or steel could be used as substitutes for one another, either generally or in some particular uses. Establishing the relevant product market or line of commerce is one of the most intricate areas of anti-trust law to apply.

35. The dispute here centers on whether newspapers and television stations are part of the same product market, or in other words are competitors.[11] In anti-trust terms this is a basic question, for if they are not, then the cross ownership which exists does not suggest that owning both would lead to owning a larger share of the same market. According to the Department of Justice, newspapers and television stations are in many ways engaged in the same business, namely attracting audiences and selling them to advertisers. While it does acknowledge that the two are not interchangeable for all advertisers, it asserts that the two are far more alike than they are different. It also contends that there is a public interest in preserving competition between products which are physically distinct but are commercially substitutable for certain classes of customers. Since Justice sees newspaper and television advertising as interchangeable, it would define the product market so as to include newspapers and television stations.

36. A number of other parties have expressed a contrary view on the subject. It is their reading of pertinent cases that newspapers and television stations constitute separate lines of commerce. The principal distinction mentioned by these parties seems to be based on differences in the kind of advertising carried by each—the newspaper being mostly a vehicle for local advertising with television stations carrying mostly national (or at least regional) advertising. They also mention a distinction in usage, with television being capable of conveying motion, activity and emotional ambience and newspapers being needed for the presentation of extensive factual information that television

[11] A similar comparison is made between newspapers and radio stations.

can present only in fragmentary pieces or for uses that do not extend beyond a simple brief exposure.

37. *Relevant Geographic Market.* To evaluate the economic implications of the situation requires knowledge not only of the product line but of the geographic confines involved as well. Depending on where the geographical line is drawn, the situation could be much altered. Generally speaking, as the area enlarges, the part of the market belonging to the company in question drops as other economic entities are included in the market share calculations. The subject is not the simple one it may seem, as there are a number of ways to go about the determination. Thus, as parties have pointed out, even the Commission has approached the subject differently at different times. In the *Frontier* case,[12] the Commission dealt with the question through the use of the city and environs as the relevant geographic market rather than the much larger Grade B coverage area of the television station in question. Later, when considering the *Chronicle* case,[13] the Commission used the station's Grade B contour.

38. As might be expected, the parties favoring divestiture urge a narrower geographic confine for use in a Commission determination, and those opposing divestiture urge a broader one employing Grade B coverage or ADI for the television station and for newspapers the similarly extensive primary market area or the city and retail trade zone. In the Department of Justice filings against the renewal applications for several stations, the thrust of its pleading here has been followed, with use of a market in no case larger than the equivalent of a city and its suburbs.[14] Conversely, the opposing parties urge the Commission to apply its own standards and to reject as artificially contrived the market concepts of the Department of Justice.

39. *Market Share of Newspaper-Television Station Combinations.* Certain facts mentioned by the parties are not in dispute. Daily newspapers tend to be much larger enterprises than television stations. Radio stations are significantly smaller than either. Moreover, few cities have competing daily newspapers, so that from the point of view of advertising revenues, a daily newspaper-television station combination would inevitably garner a sizeable portion of the total local advertising revenues. The dispute, then, centers on the importance of these economic facts in terms of Commission policy goals. Also, to what extent should the Commission take into account the multiplicity of media exposures from magazines and other sources, in determining the degree of concentration? The Department of Justice points to a Roper study that indicated that the public principally relied on newspapers and television stations for their news. On this basis they would give little weight to other media sources. Justice then goes on to compare the local market shares of the newspaper and television station combinations with Clayton Act Section 7 merger guidelines. Simply put, in an oligopolistic situation the acquisition of even small

[12] 21 F.C.C. 2d 570 (1970); 23 F.C.C. 2d 316 (1970); 27 F.C.C. 2d 486 (1971); 29 F.C.C. 2d 480 (1970); 35 F.C.C. 2d 875 (1972).
[13] 16 F.C.C. 2d 882 (1969); 20 F.C.C. 2d 903 (1969); 40 F.C.C. 2d 775 (1973).
[14] Separately from the anti-trust based market concepts is the alternative suggestion from Justice to divest wherever the Grade B television signal encompasses the SMSA of the newspaper community.

shares of the market can conflict with these guidelines. However, as a number of parties point out, the prohibition in Section 7 applies to acquisitions, not to internal growth, as was the case with the creation of most newspaper-television combinations. Instead, these parties point out that the Sherman Act prohibitions on monopolization apply. In such instances, Section 2 of the Act requires a showing of action of the entity in question to set prices or otherwise restrict competition. They contend that no showing has been made that establishes anything resembling such economic power. According to these parties, even the Rosse, Owen, Grey study[15] purporting to show higher rates being charged by newspaper-owned television stations, to which the Department of Justice refers, is subject to many doubts, so that even the Department does not vouch for its methodology or conclusions. The conclusion that a 15% price increase differential is available to newspaper-owned TV stations is directly refuted in two industry studies which point out that the other study did not take audience figures into account in relation to prices charged. Our own examination does not substantiate the findings of the Rosse study.

40. It is clear that by any standard, market differences do exist, and that the extent of economic power, whether exercised or not, varies. When this proceeding began, there were 19 instances (now fewer) in which the owner of the only local daily newspaper also was connected to the only television station licensed to the community. From a concentration point of view, these would seem to present the most severe cases, but even in these instances, the industry did not agree that action by this agency was appropriate. They say also that from a diversity point of view even in these communities there is a plethora of media voices originating in or entering the market. While the overall industry view is that there is no need for any divestiture, at least one broadcast filing (that of the Post Company, of Idaho Falls, Idaho) seems to indicate that presumptively in these cases of one-owner markets, there is a condition of inadequate diversity. The Post Company prefers a rule to an *ad hoc* approach or if that fails to be adopted, a policy statement. Either, it argues, would be preferable in terms of industry stability because it would give advance notice, simplify administration and reduce uncertainty.

41. *Audience Share of the Market.* The National Citizens Committee for Broadcasting ("NCCB") would follow the approach of the de Jonckheere study[16] on market share and give appropriate market-share weights on a scale of 100, divided 40 to daily newspaper, 40 to television stations, and 20 to radio stations. Each entity would be given its circulation share (or be evenly divided for radio stations) and the market share thus be derived. Although NCCB would not include weekly newspapers, it says if they are to be included, they should be given 1/7 the weight of a daily newspaper. To the figures on market share thus obtained NCCB would apply both *per se* and *prima facie* limits. If a single owner had a 30% share it would be considered *per se* objectionable; 20% to 30% would constitute a *prima*

[15] *Empirical Results on the Price Effects of Joint Ownership in the Mass Media* (1970). See para. 96, *infra*, and Appendix B, p. 1.
[16] *Monopoly in the Media*, by Terrall M. de Jonckheere. See Appendix B, p. 2.

facie showing of concentration that a party could offer to rebut. NCCB would have the Commission ignore a less than 20% market share absent an allegation of abuse. According to NCCB, its plan avoids the pitfalls of a mandatory across-the-board ban which by its nature could not take into account differences in individual markets. Likewise, it sees this approach as being preferable to the haphazard methods involved in a totally *ad hoc* procedure.

42. *The Place of Anti-Trust Considerations in Commission Determinations.* No one has argued that anti-trust considerations are totally inapplicable to the media, rather the dispute centers on the importance of anti-trust considerations to the resolution of the public interest issues now before the Commission. The Department of Justice points to its own responsibility for the enforcement of the anti-trust laws and for the preservation and enhancement of commercial competition as the basis for its filing here. Its view is that the Commission should act itself based on the anti-trust arguments which have been made. In particular, Justice says that there is too much concentration of ownership which in turn has caused a curtailment of the options open to advertisers. Throughout, the Justice filings proceed from economic premises having principally to do with economic competition for advertising. It is not that diversity of viewpoint is not dealt with; it is. Rather, it is a question of the orientation, of views expressed in competitive terms, views it feels the Commission is obliged to consider.

NEWSPAPER OWNERSHIP—DIVERSITY OF PROGRAM AND SERVICE VIEWPOINTS

43. The preceding discussion has focused on the economic significance of combinations. The other side is the impact on the dissemination of ideas in a democratic society if there is a combination of media holdings held by a single entity. At what point, if any, is there a lack of diversity of viewpoints and programming or if such diversity at some level exists does that end the need to consider the size or market share of the entity in question? These are the kinds of questions to consider.

44. Opponents of the proposal have argued that the proposal rests on the false premises that current diversity is inadequate and that 51 voices are necessarily better than 50. However, they assert, if the forced transfer of a station to the 51st voice results in the station's news operation's being reduced to "rip and read", the addition of the 51st voice would not have been beneficial.

45. *Do They Speak With One Voice.* Opponents contend that cross ownership of newspapers and broadcast stations does not mean that both entities speak with the same voice. Most of the parties state that their broadcast stations and newspapers have separate management, facilities, and staff, including news and advertising staffs (which compete with each other for advertising), and do not have joint advertising rates. Some even claim that because they have separate editorial boards they present editorials in one outlet which are opposed in the other. We are told that there are other built-in protections against commonly owned newspapers and station's offering the same viewpoint

and information. These parties point to the professionalism in journalism and the development of industry practices and codes of ethics which transcends employee-employer loyalties and result in highly independent staffs operating even common owned media. Also, the technology which requires specialized and separate management teams for various media holdings is said to limit the influence of the common owner. Finally, we are assured, there is protection because of existing diversity, so that in major markets it would not be possible to control the informational output of the communications media or to prevent a significant point of view from reaching the public. These parties assert that if abuses of this nature were occurring, there would be outcries from the public and other local competitive media. They believe that the absence of such complaints is the most telling argument against the need for the proposed rules and that in smaller markets economic considerations may inhibit the financial separation of different media.

46. Supporters, on the other hand, argue that a so-called separation cannot be considered as equivalent to separate ownership. They fear conscious or unconscious decision making protective of the other entity and even more the possible inhibition in the operation of each without regard to the consequences on the other. They urge separate ownership as the only way to have truly diverse and antagonistic voices.

47. *Adequacy of Current Diversity.* Opponents point out that there has been a long term trend of increasing diversity of media ownership with many more broadcast stations operating now than formerly was the case. According to NAB, in the top 100 markets (based on size of SMSA's) the total number of media outlets has increased markedly. From 1922 to 1967 the number of broadcast outlets increased 968%. While the number of daily newspapers has remained about constant, they say that there has been considerable growth in circulation, particularly in smaller cities. This leads these parties to conclude that in most major markets the addition of one more media owner would have a minimal effect on the amount of diversity in that market as there will continue to be a large number of media owners even if the proposed rules are not adopted.

48. More specifically, many parties referred to the Seiden study submitted by NAB to show that there is ample diversity in their own markets. The Seiden study listed all media available in each market in various categories, including those originating within and outside the market. Unlike the premises under which this study was done, the Justice Department would only include local television and newspapers in evaluating diversity since in its view these are the only effective competitors for local advertising. Weekly newspapers and other periodicals as well as broadcast signals originating outside the market on this basis should therefore not be counted. Opponents of the proposed rule and of the Justice viewpoint recommend that national media be considered in addition to local media because they reach substantial numbers of people to provide diverse information sources. Further, they urge that the fact that the public favored one medium or one newspaper or broadcast outlet rather than another should not be taken as indicating a lessening of the diversity of available media.

They thought it should be irrelevant for the purpose of the Commission's proposal that the circulation bases differed so markedly.

49. At the time the proceeding began there were ninety-four (94) TV stations which were affiliated with local newspapers. The Seiden study purported to show that there is abundant diversity in these communities as well as elsewhere—that there is abundant diversity in every TV market. In New York City, we were told, there were 610 media with 434 owners. Even in Zanesville, Ohio, the then most concentrated market, there were 49 media with 39 owners. Of these, four media were considered local, and were held by two owners. In Glendive, Montana, the smallest market, there were 36 media with 30 owners. Of these, five media with four owners were local. The average for the top 50 markets was 317 media, owned by 170 different groups. Of these, 139 originated in the market and were held by 111 different owners.

50. The American Newspaper Publishers Association ("ANPA") says that the number of newspaper-owned TV stations has decreased since 1948, when 48% were owned by newspapers, to 14% in 1969, and there has been an absolute as well as proportional decrease in newspaper-owned stations since 1955. The NAB says that newspaper ownership of all broadcast outlets is less than 7%. The Udell study submitted by the ANPA showed that in 78 markets with newspaper owned TV stations, 143 TV stations commenced operation after the newspaper owned station, and 131 of these new operations were started by non-newspaper interests. This to them shows that newspaper owned TV stations have not discouraged others from entering the field. Udell found that although often the newspaper-owned TV station dominated its market, there were many cases in which it was not the dominant station.

51. Opponents assure us that the Fairness Doctrine, Section 315 of the Communications Act, and the developing body of law falling under the category of "access to media" ensure that stations will not present only one viewpoint. Moreover, we should take into account, they insist, the fact that the public's increased awareness of its stake in the free flow of information has caused an increase in the filing of petitions to protect that interest and this too helps to ensure diversity of viewpoints. They conclude that not only do we have enough diversity, in fact modern technology has brought society to the point of information overkill, where the individual is paralyzed by the sheer volume of information and available choices.

52. Supporters of Commission action do not accept any such view. Instead they see a growing diminution in major media choices particularly newspapers and they assert that the Seiden approach uses numbers to obscure the situation by the faulty means of equating media regardless of subject or circulation.

NEWSPAPER OWNERSHIP—SPECIFIC ARGUMENTS

53. *The Commission Should Proceed on an Ad Hoc Basis Rather Than By Rule Making.* The parties who oppose adoption of the rules contend that as to newspaper ownership the Commission should continue to use the *ad hoc* approach as it has in the past rather than proceed on a rule making basis. The Commission, it is said, has greater flexibility in attacking situations where specific abuse may occur by the *ad hoc* approach rather than by seeking an across-the-board solution by means of a rule. They insist that both the Commission and the Department of Justice have the tools and the authority to reach any situations with the potential for abuse so that wholesale divestiture without regard to the facts of each particular situation is simply not warranted. Each market, they say, has its own characteristics and each differs from every other market; a rule would not take these differences into account nor would it make provision for those individual situations where there is no question that the cross-ownership has resulted in superior service. Opponents further argue that the proposed rules reflect only one component of the public interest, i.e., diversity, and ignore other important elements such as the costs and detrimental effects of forced separation.

54. The rule making approach, opponents charge, represents a blunderbuss policy in place of precise and carefully fashioned judgments based on facts in each individual situation. They assert that if the Commission were to continue to attack the problem on a case-by-case basis, it could root out those situations which threaten injury to the public interest without itself inflicting injury on the public interest by requiring the divestiture of a cross-owned station where there has not been so much as a suggestion of impropriety. The Commission should, it is asserted, consider, in each individual situation, such factors as the extent of interdependence of the cross-owned media in a particular market; whether the market is metropolitan, regional or local; the prospects for financial independence; and the extent of the possible disruption of service to the community. Factors such as these, they say, do not lend themselves to consolidation in a rule. Finally, the opponents argue that, in order to warrant an industry-wide approach such as that represented by a rule making proceeding, the Commission must, at the very least, indicate that the problem which it seeks to attack is so widespread as to require such an approach. This they charge the Commission has not done.

55. Supporters urge us to act through rule making rather than *ad hoc* procedures as in keeping with our stated intentions in this regard and with other approaches taken in the area of concentration. Moreover, we are told, such an *ad hoc* procedure could introduce uncertainty to the detriment of the industry and public alike.

56. *Divestiture Would Not Necessarily Accomplish the Desired Ends, and Might Produce Harmful Results.* Opponents have asserted that if any divestiture were to be accomplished through the trading of broadcast properties between newspaper publishers, there would be no overall decrease in concentration of control nor any increase in the total number of available voices. Thus, they insist, no real benefit would be brought about by divestiture, but real detriment would. An economic study offers the view that it is easier to operate a broadcast station within your home market, so that a station outside the home market would bring a lesser price. Further, a publisher accustomed to operating a station at home might be unwilling to undertake a similar opera-

tion in some other city, with the attendant increases in costs and additional control and managerial problems.

57. The economic studies further contend that by the very fact that many stations would be put on the market, the value of those stations would be reduced. However, in spite of this reduction of the price of stations, it is asserted that in many instances the price will remain too high to service the debt capital necessary to purchase a station. Under these circumstances, they expect that many of the available stations would be purchased by multiple owners or nationwide conglomerates, with the result that the divestiture requirement would not increase the overall diversity of voices, and it may in fact decrease the number of available voices. Supporters point out that as to the community in question, they nonetheless would represent a new choice.

58. Some parties assert that there is a correlation between newspaper ownership and high quality news and public affairs programming. Others contend that economies of scale can be achieved with cooperative news gathering facilities. In both instances, we are told, divestiture would result in a loss of these benefits, perhaps causing a reduction in the quality of program offerings, because owners could no longer rely on these resources. However, on the other side it has been alleged that there is no correspondence between the quality of news carried on a television station and that contained in a commonly owned newspaper. In addition, proponents of the rule contend that there has been no showing that economies of scale exist or if they do exist, they charge that they are products of an oligopolistic situation which has resulted in higher advertising prices on jointly owned facilities. Post-Newsweek asserts in its study that it is not common ownership but other factors [17] which account for higher advertising rates, and various parties point out the study showing higher television rates failed to take size of audience into account.

59. *The Proposed Rule Assumes a Similarity in Cross-Ownership Situations.* According to various opponents the approach we contemplate fails to recognize the differences between UHF and VHF, between radio and television, and between markets of different sizes, subordinates the public interest to administrative convenience and will have lasting deleterious effects on the industry. Thus they say we should observe these distinctions and recognize that a rule requiring divestiture for radio-newspaper combinations is not necessary because in most large markets an individual radio station does not have significant market power. However, it is said, in smaller markets (below the top 100) individual radio stations may be significant competitive factors. Therefore, we are urged to review radio-newspaper combinations in markets below the top 100 on a case-by-case basis and require divestiture where necessary. Others urge the adoption of specific rules for smaller markets.

60. Licensees in smaller markets generally believe the Commission's concern should be with larger markets and exemptions should be provided for smaller markets. They point to the smaller size of these

[17] The four are: being the first station on air in market, being a CBS affiliate, operating on a low-band VHF channel or lowest channel in market, and having the highest audience share.

combinations, arguing that as a result there is less cause for concern about detrimental impact and more about disruption. However, licensees in large markets believe the serious problem exists only in those markets where there is only one daily newspaper and only one television station. These parties place their stress on the number of direct competitors in the market.

61. *Unique Situations.* Several parties argue that "unique" situations in particular markets require that the proposed rules not be applied in those cases. For example, the licensee of a Class A FM station in Santa Monica, California, and publisher of an evening newspaper in Santa Monica argues that his holdings constitute a minute fraction of the total mass media in the market. Santa Monica, a suburb of Los Angeles, is said to be saturated with broadcast service, receiving primary signals from 10 AM, numerous FM and 11 commercial and one educational television stations. Similar arguments have been made that other communities are overshadowed by nearby cities of much greater size, and we have been told that in such communities, UHF and FM stations might not have survived without newspaper ownership.

62. *Jointly Owned Broadcast Stations and Newspapers in the Same Market Can Give Better Service.* One frequent argument is that joint ownership of newspapers and broadcast stations made possible the early development of FM and TV service even though these pioneering stations often had to be operated at a loss. This leads these opponents to conclude that had the resources of newspapers not been available, the public would have been without such service for a long period of time.

63. In addition to the historical argument, these parties offer arguments supporting the view that benefits would continue to accrue. According to the exponents of this view the public would lose more than it would gain if those of the journalistic tradition are excluded from broadcasting. They argue that newspaper owners, coming from a tradition of journalism rather than entertainment, have set high standards of emphasis upon informative broadcasting with extensive news staffs and upon dedication to meeting community needs and advancing community projects. In fact, former Chairman Newton N. Minow has suggested that the public interest might better be served if, contrary to the thrust of our proposal, more newspapers were given the opportunity to operate TV outlets in their communities. He also suggested that the tradition of professional journalism offered by the newspapers greatly enhanced their ability to offer programs in the public interest.

64. The argument has been made that integrating broadcast and newspaper operations enables the licensee to provide service in the public interest which could not be provided if the operations were conducted independently and under separate ownership. Combined ownership is said to permit experimentation, innovation, minority programming, more effective dissemination of news and public information, independence from advertisers, lower advertising costs, financial stability, and otherwise contributes to diversity. They argue that because of the combination, many efficiencies and economies of operation can be effectuated, such as economies in buying and maintaining equip-

222-632 O - 77 - 6

ment, the joint use of buildings and office space, the common staff of program, technical and administrative personnel, etc.

65. Many have asserted that newspaper-owned broadcast licensees have a record of public service which is among the highest in broadcasting. Their contributions to the public interest constitutes in the view of these parties a tangible benefit which cannot be sacrificed for the theoretical benefits which the Commission has assumed will result from the proposed divestiture. They assert that newspapers owning broadcast stations in the same community are doubly conscious of their responsibilities to the public and have a greater knowledge of and immersion in the community's needs and problems than do non-newspaper owners. Local newspapers are said to often be locally owned by people who have long been directly involved in the community and in community service, particularly as an outlet for public expression. They insist that newspaper ownership of broadcast stations is more stable than that of other entities and that newspaper owners do not traffic. Continuity of ownership of broadcast stations we are assured would avoid the weaknesses inherent in stations which change hands frequently. We are told that the long term owner is continuously aware of community problems and by so doing can maintain a long range effort to deal with those problems.

66. Conversely, the argument is made that the existing owner takes the community for granted, and assumes too much in connection with ascertaining community problems. A newcomer, the view goes, would gain fresh insights since it would have to ascertain without presumption based on past history. Thus, the argument goes, service could actually improve.

67. In connection with radio stations in particular, opponents of the proposal see real benefits in newspaper ownership. They say that there are many situations where a radio station could only survive economically because of the support provided by a co-owned newspaper in the same market. If this were precluded, they feel the community would have fewer voices. They also assert that such a combination could provide higher quality programming than could normally be expected from singly owned stations. Moreover, the programming of newspaper owned stations is said to function as a counter-balance to national network dominance.

68. *Broadcast Media and Newspapers Are Not Comparable.* Although opponents of the current proposal acknowledge that newspapers and TV are the public's primary source of news, they contend that there is a radical difference between them, both in method and scope. They are seen as complementary, not competing, sources of news. In their view the Commission's statement that newspaper ownership of a co-located TV station directly parallels joint ownership of two TV stations in the same community, ignores many salient differences. For example: (a) the broadcast media bring the public only the headlines whereas newspapers provide the details and background; (b) the broadcast media devote no more than 10% to 12% of their time to news whereas newspapers devote 100% of their non-advertising space to journalistic function; (c) broadcasting is basically an entertainment medium whereas a newspaper is primarily a

news medium; (d) a newspaper is a recorder of events whereas the broadcast media are not; (e) newspapers provide a permanent record for future reference whereas the broadcast media do not; (f) the types of advertising and the products advertised through the two media differ; (g) the two media do not necessarily encompass the same market; (h) the persons who use TV as their primary source of communication do not necessarily subscribe to newspapers; and (i) the broadcast media are inherently incapable of providing on a day-to-day basis in-depth local reporting whereas a newspaper has such capability. Pointing to the Commission's *Further Notice* in this proceeding (at para. 29), where it was indicated that studies showed that persons replying most heavily upon newspapers as a source of information are those identified as leaders or opinion molders, the opponents state that the joint ownership of a newspaper or TV station is likely to make no difference to these people since the nature of the newspaper analysis of a news event varies so greatly from the most abbreviated form of news which appears on TV. Further, we are assured, these persons are unlikely to rely on a single source of information for their news.

69. The point is also made that the two media function quite differently in the manner in which they cover the news, thus reflecting not only the innate differences between the media but differences in coverage as well. These factors are said to ensure that the public receives the benefits of separate news sources, which do, in fact, even if they are commonly owned, offer divergent viewpoints and approaches to issues of public concern. Editorial practice we are told, is a far more significant facet of diversity than is ownership. Accordingly, they would reject what they see as the Commission's assumption that cross-ownership causes newspapers to speak and write with one voice. Not all parties, of course, find these distinctions particularly important as they continue to see the two as parallel entities.

70. *The Rules Would be Contrary to Past Policies and Pronouncements That Led to the Development of the Present Broadcast Services and are Inequitable to Those Who Acted in Reliance on Those Policies.* The various parties presenting this argument submit that the present structure of the broadcast industry has been created by the Commission which has licensed each station in question, at times after a comparative hearing, and repeatedly renewed those licenses after finding that the renewal would be in the public interest, convenience and necessity. These parties contend that it would be a breach of faith for the Commission to now reverse these prior decisions and ban the cross ownership which was previously approved.[18]

71. They assert that diversity is one of several fundamental criteria considered by the Commission in granting broadcast licenses, and the Commission has considered these other criteria, including local ownership, integration of ownership and management and experience, in finding that a grant of a broadcast license to a newspaper or existing broadcast licensee would serve the public interest. Instances of such

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[18] In part, this is in response to the Commission's statement in the *First Report and Order* (in particular in para. 22) that changed circumstances necessitated that a different view now be taken regarding such combinations.

actions they point to include the licensing of the AM and FM stations in Elyria, Ohio, to Elyria-Lorain Broadcasting Co., the publisher of the local newspaper; the assignment of KOA–AM–FM and TV, Denver, Colorado, to a single party; and the grant of the application of Paducah Newspapers, Inc. for WPSD–TV in Paducah, Kentucky. They also mention *Orlando Daily Newspaper, Inc.*, 11 F.C.C. 760 (1946) and the *Policy Statement on Newspaper Ownership*, 9 R.R. 702 (1944). Based on their reading of these precedents the current proposal would without valid basis, they aver, summarily reverse the ongoing practice of years standing.

72. On the other hand, supporters of Commission action assert that while the economic and technical considerations of the 1940's and 1950's justified a more lenient Commission policy toward cross ownership, those prior considerations are no longer operative. Under present conditions, they think it is unlikely that the number of newspapers and broadcast stations will significantly increase in the foreseeable future, and the Commission is therefore justified in taking a more restrictive approach (see footnote 18).

73. *Great and Irreversible Damage Would Result To Media and To Individual Stations and Newspapers.* Opponents insist that no matter how economically strong, no industry can absorb unlimited burdens. At some point they say, there is a limit, which once exceeded, leads to a collapse of that industry. They assert that quite a number of burdens have been imposed on broadcasters so that the point is nearing when the ability of the industry to respond may be impaired. As examples of such burdens they mention a series of recent Commission actions such as increased fees, new renewal procedures and prime-time access as well as the more frequent occurrence of petitions to deny and increased costs. The point is that whatever the source, whatever the legitimacy of the justification, the unavoidable impact on the broadcaster is a burden that can lead to a driving out of needed capital as well as a pushing away of fresh talent and creativity. Opponents argue that too much of a good thing can be fatal and that the price paid would be in lessened diversity, which is the opposite of the hoped-for result. Supporters assert that we should question these dire predictions. These, for the most part, are seen as greatly exaggerated. Such validity as is accepted is said to exist in only some individual circumstances.

74. The proposed rules would also have adverse economic consequences for newspapers we are advised by opponents. Divestiture could impair the revenues of newspapers and result in the decline in their value. Moreover, they contend that to the extent owners decide to keep their broadcast stations and divest their newspapers, there would be a decline in the value of newspapers with potential for forcing marginal operations out of business. They also suggest that the proposed rules would threaten the balance reached by the Congress in the Newspaper Preservation Act between the public interest in competition and the public interest in continued financial viability of newspapers and their editorial independence. Finally, they express a concern that adopting rules might limit the ability of publishers to enter into electronic newspaper distribution in the future. They feel that for newspapers to remain viable it may be necessary for them to be able to

use something other than the present modes of newspaper production and distribution which may become too slow or expensive.

75. Divestiture, opponents assert, also raises questions concerning the continued viability of special format daily newspapers. For example, the licensee of an AM and FM station in New York City also publishes a daily Yiddish-language newspaper. The paper operates with an annual deficit which in part is offset by an annual profit from the radio stations. The licensee contends that funds from the radio stations are necessary to provide for continued publication of the paper.

76. Finally, a particular danger is said to be involved in divestiture because the results would be permanent and irreversible. They assert that the genius of the administrative process is its ability to be flexible and to consider matters in the light of changed circumstances, attributes which could not be brought to bear for there is no way to return to the *status quo ante* if the results are not what were intended. They argue that since there is no way to return the outlets to their original holders if the action proves improvident, the risk is so great that any cause for concern is sufficient to establish that the step should not be taken unless there is clear proof of harm from the existing circumstances.

The Rules Would Discourage Risk Capital in Broadcasting and Impose High Costs of Operation Contrary to the Public Interest

77. This argument, made by several broadcast interests, is that divestiture would result in a drastic alteration of the industry structure and breed economic instability. This they say would come about because the new owners of divested stations would face significant economic burdens, principally as a result of paying high prices for broadcast properties that have appreciated greatly over the years. Because of high interest rates, the cost of debt service will reduce the working capital and profit accumulation which would otherwise be available for programming including news and public affairs. Beyond these economic factors, various other burdens are mentioned as being placed on broadcasters, and the fear is expressed that this could be a last straw. The continuing infusion of capital, energy, and creativity needed to properly nourish the industry in their view may be stymied because of the economic burdens, the governmental interventions and restrictions imposed. The NAB sees this proceeding as one in which adoption of the rules would give just such a negative signal to those now involved or who would become involved in broadcasting: results clearly detrimental to the public interest. Supporters say they cannot agree that an industry they see as characterized by extraordinarily high profits would somehow become anathema to investors.

The Proposed Rule Amounts to the Virtual Abandonment of the Commission's Policy Favoring Local Ownership

78. Opponents charge that the divestiture provision of the rule would frustrate the Commission's policy favoring local ownership which has long been considered conducive to programming responsive to local needs and interests. This they say can be seen in the Commission prediction that many licensees will simply trade stations with

other licensees, thereby achieving divestiture without significant upheaval in the identity of the media ownership. They argue that this trading of broadcast properties would result in absentee ownership. However they do not think such ownership is desirable, particularly where a broadcast station is traded away from a newspaper with local ownership and strong community ties. Rather, they believe that the strong affiliation between a newspaper and its community often results in programming on a commonly owned television station which is particularly responsive to the needs and interests of the community. They think an absentee owner, with less contact with the community might be less concerned with the public interest and more concerned with the balance sheet, and the divestiture may result in the fragmentation of professional staffs which have been built up over the years to provide the best possible service to the public. This leads them to conclude that the absentee ownership resulting from divestiture would therefore result in a loss of service to the public.

79. Opponents have rejected suggestions that the first opportunity to purchase a station be given to a local group or that more than one potential purchaser be submitted to the Commission as unworkable and contrary to Section 310(b) of the Communications Act. They assert that such courses of action would interfere with existing interests and equities and jeopardize existing service. Proponents, on the other hand, asserted that any resulting reduction in local ownership should not be used to justify and maintain a monopoly situation, and they urge the Commission to proceed with divestiture. In their view, local ownership as a goal necessarily pales in comparison with providing needed diversity.

Newspaper Ownership—Miscellaneous Arguments

80. Parties opposing the Commission's proposal have offered several procedural or jurisdictional objections. Several have taken the view that the proposal represents such a fundamental policy shift that the Commission should not act without Congressional mandate. It was their view that this subject should be considered at Congressional hearings from which policy guidelines would emerge. The Commission is urged not to proceed without such guidance from the Congress.

81. Two other procedural objections to implementation of the proposed rules have been interposed, both relying on the view that a hearing would be required beforehand. One asserted that the Commission should not proceed without holding oral argument on the proposal [19] and the other insisted that any affected party would be entitled to a full evidentiary hearing before it could be required to divest.

82. Progressive Broadcasting Corporation is licensee of Stations WHOM–AM and FM and is commonly owned with a daily newspaper. It wonders if the rule would apply to it and asserts that if it would special recognition is required of its unusual situation. It argues that a rule should not apply to it since the radio stations are essentially Spanish language and the daily newspaper, even if it is circulated generally, reaches only an audience that reads Italian.

[19] This, of course, has taken place.

Moreover, it asserts that the Spanish speaking audience for the stations does not much overlap with the readers of *Il Progresso Italo-Americano*. Aside from the divergence in audience, Progressive contends that neither has the broad general appeal and impact that seemed to be the cause of the Commission's concern. For itself and others similarly situated Progressive asks that any rule which might be adopted not be considered applicable to such situations.

83. The Illini Publishing Company, a not-for-profit corporation at the University of Illinois, owns the daily student newspaper, an FM station, and the yearbook. It stated that it would not comment on the desirability of cross-ownership for commercial properties but that cross-ownership in its situation is a guarantee of financial and therefore editorial independence from the University administration, the student government, or any other potential pressure group. It has never accepted student fees but has depended on the sale of advertising and circulation, and in various years one or the other of the three media was supported by its fellows.

84. The Forward Association publisher of *The Jewish Daily Forward* and licensee of New York City Stations WEVD–AM and FM says it is not clear whether the rule would apply to foreign language newspapers. The Association says it should not, but if it did, the Commission should hold an evidentiary hearing in each case to determine whether divestiture should be required.

85. The Oklahoma Press Association in opposing the proposal notes that some universities have both newspapers and television stations. While educational broadcast stations are exempted from the duopoly rules, it points out that it is not clear where the proposal leaves Notre Dame University and the University of Missouri, both of which operate *commercial* television stations (WNDU–TV and KOMU–TV, respectively).

86. Finally, several parties wonder how many papers per week a newspaper must publish to be defined as a daily? Is a paper that publishes three days a week a weekly and one that publishes four days a week a daily? They also suggest that if the proposed rule is adopted, it could be circumvented by publishing six different weekly publications, each on a separate day.

Divestiture Would Constitute an Unprecedented Governmental Intrusion

87. The NAB and others insist that there is no precedent for the action proposed here. Never before in the history of the FCC or any other governmental agency, they assert, has a proposal of this magnitude ever been implemented. In strictly legal terms, the charge is that no agency has ever so proceeded without basing its action on a proven law violation and in furtherance of an express statutory authorization. Here neither is said to be present and this makes it all too clear how drastic and extreme the proposal really is. The closest example, that of the 1943 FCC action affecting radio duopoly cannot, it is said, be considered analogous. In that situation, we are told, relatively few stations were affected and the economic impact was notably smaller than that which would be anticipated here.

Divestiture Would Have a "Chilling" Effect and Inhibit Free Speech and Press

88. The charge is made by the NAB that already extensive regulation exists and unwarranted extension of such regulation could only have harmful results. Inevitably, they feel, a fear would be created that governmental action could be invoked as a means of expressing displeasure at a course of conduct, not because it is unlawful but because it is contrary to governmental preference. Even if the current proposal in itself did not bring the weight of government to bear in such a manner, they believe that the fear would be created that it could happen in the future. The net effect they foresee would be a restriction on free speech, a curtailment of creative journalism, affecting newspapers as well as stations. Thus, the NAB states, in a democracy, it is the power of the government, not that of the press that is to be feared. Especially in the current political climate, the action here proposed is bound to be interpreted as a governmental assault on the free press, it is argued.

89. The lesson of history in this regard is said to be clear: there is no such thing as compulsory freedom. Just so, there can be no compulsory diversity. The greatness of this country's press, print and broadcast, we are told is the product of the lack of governmental intrusion. It is its freedom of operation that has and will continue to offer a continuation of the situation in which American diversity exceeds that of any country. The Commission is urged not to yield to temptation by following the restriction paths traveled by other countries. Rather, the Commission should follow the path of freedom and non-intervention. Supporters assert that the structured approach involved here is a lesser danger in free speech terms than Commission intervention in programming as could happen in fairness cases.

If Any Rule Is Adopted, Existing Interests Should Be Grandfathered

90. This view which is in direct conflict with the divestiture proposal was expressed by Duhamel Broadcasting Enterprises, Inc., and Paducah Newspapers, Inc. Divestiture, Paducah says, would be disruptive, counter-productive, unfair, oppressive, etc., and should not be ordered in the absence of a showing of specific harm. Although cast somewhat differently, the point is essentially the same as that presented by many other parties and which has been discussed previously.

Proposal Too Rigid

91. Several points are subsumed under this heading. One concerns the view expressed by several parties that an exemption for UHF stations is an economic necessity. At most, they argue, these situations should be considered on a case-by-case basis. Another party takes the view that in certain markets, a weekly newspaper can be the more powerful medium, not the daily, and the rule would give no recognition to such a situation.

The Commission Should Adopt Specific Rules To Deal With Potential Abuses

92. Several parties suggest that if the Commission can identify evils which could occur in cross-ownership situations, such as preferential advertising rates for purchase of both newspaper space and broadcast commercial time, it should regulate such practices by specific rules. The Commission's response to the payola scandals—sponsorship identification requirements of Section 73.119 and 73.654—is said to be a good example of selective rule making.

93. According to various parties, the objective of achieving maximum diversification of media ownership is not in and of itself determinative of where the public interest lies. This is said to be evidenced by the numerous cases in which the Commission has granted, in comparative proceedings, applications resulting in a greater concentration of media control. They take the view that the Commission's proposal would establish an irrebuttable presumption that any legally qualified applicant unconnected with a newspaper will serve the public better than a station owned by a company which also publishes a local newspaper. A complete prohibition of common ownership is said to risk the exclusion of the best available interested party to the community which in some cases might lead to the exclusion of the only applicant. In sum, the view is that the single most critical factor in governing the extent to which the public interest will be served is the licensee's motivation and interest in serving the community. According to many affected parties the common owner of co-located newspaper and broadcast facilities is often the only one in the community so motivated. On this basis, they assert that the proposed rules would work to the detriment of the public, and thus they urge rejection of such a rule. Supporters see things quite differently, questioning whether such a grant could really add anything worth the cost of possibly forever excluding another party which might step forward in the future.

MAJOR STUDIES SUBMITTED

94. A number of studies have been submitted, including some by parties not associated with the newspaper or broadcast industries. The studies cover four major topics. Some studies treat more than one topic, but are listed only once in the summary which follows. A list of these studies is contained in Appendix B.

95. *Economic Consequences of Divestiture.* Both the Frazier, Gross study and the First National City Bank study indicate that combination owners will most likely transfer their TV stations rather than their newspapers. First National is extremely pessimistic about the financial outcome for sellers of TV stations, under divestiture market conditions. Frazier's judgment is that TV stations will sell at 10% to 20% below true value if all affected stations were to be divested. Our own evaluation is that the concern may be exaggerated.

96. *Effect of Common Ownership on Competition.* No claims were made that newspaper-television station owners have committed any specific non-competitive acts as such, but Rosse et al. attempt to show that, all other things held constant, newspaper-owned TV stations charge their advertisers higher prices than other TV stations, and that this is probably due to the monopoly effect. Their calculations show that newspaper-owned TV stations charge about 15% higher rates. The NAB and ANPA statisticians see a conceptual error in Rosse's

model—audience was omitted as one explanatory variable, and when the error was corrected, the difference in prices between newspaper-owned TV stations and others was not statistically significant. The Post-Newsweek study also covered this point. The Commission's own examination of the point fails to show an effect on rates attributable to newspaper ownership. Levin uses past TV station sales prices as a measure of whether newspapers have been subsidizing their owned TV stations. He finds they have not.

97. *Effect of Common Ownership on Station Performance.* Both the Student Group and Levin did empirical analyses to determine if newspaper-owned TV stations differ from other TV stations in the quantities of news, public affairs, local programming, etc., they present, and Levin also studied possible differences in diversity. Levin's findings appear to be inconclusive. The Student Group finds that there is no significant difference in the performance, between TV stations owned by local newspapers and other TV stations. Although the NAB findings use different methodology with the Student Group data, the results are essentially the same—no significant differences. A Commission staff study on this topic is attached as Appendix C. When the earlier submissions were prepared, the Annual Programming Reports for television stations had not yet become available. The Commission's study is the first to use this data. The American Institute conducted a study of public attitudes, behavior and knowledge of current events in two similar cities, to determine if media monopoly (Zanesville, Ohio) results in a less informed public than competitive media (York, Pennsylvania). The York population sample was found to be significantly more knowledgeable on current events, and this was attributed to the fact that the only newspaper, TV station and AM/FM radio station in Zanesville were then controlled by a single owner. J. Anderson attempts to discover whether the informational content of the news broadcasts and daily papers of co-owned media show a greater correspondence than do media separately owned. He finds that TV-newspaper combinations and radio-newspaper combinations do not result in a monolithic presentation of information, in the many sample cities studied. Cox Broadcasting's two studies result in similar findings for two specific markets where they own newspapers and broadcast stations—Atlanta and Dayton.

98. *Multiplicity and Diversity of the Media.* Sterling shows that the number and proportion of newspaper-owned broadcast stations has been on the decline since 1950. Udell says that newspaper-owned TV stations have declined from 29% (of all TV stations) in 1955 to 14% in 1969. He also points out that there has been growth in the TV industry in spite of newspaper ownership in many markets. The ANPA staff study presents tabulations that confirm the downward trend and they also show that the total media voices (including magazines and other publications) is extremely high in most markets (e.g. 660 in Washington, D.C.). Seiden's study, counting all the media voices in the ADI counties of each market, also presents high figures (e.g. 98 in San Diego; 610 in New York City). Wilcox in his submission seems to suggest that newspapers and broadcasters are not instrumental in shaping public opinion, and that with the enormous volume and contradictory viewpoints presented, people are overwhelmed and reject everything. The Commission does not believe that "counts" as such add much to our knowledge as they fail to consider the particular characteristics that assume considerable significance in many situations.

CONCLUSIONS

99. *Introduction.* It has become clear in reviewing the record of this proceeding that additional public interest considerations need to be applied in judging the public interest consequences of present as distinguished from future common ownership interests in co-located newspapers and stations. Put otherwise, the idea of divestiture, implicit in retrospective rules, requires a demonstration of more than just theory or a resting on narrowly drawn balances. Rather, we must consider the impact that divestiture would have, taking into account factors not present in connection with prospective rules, matters which must be examined if fairness is to be achieved. Before we proceed with our discussion of these two aspects separately, there are a number of general observations to be made about the public policy on which Commission action is based. The multiple ownership rules rest on two foundations: the twin goals of diversity of viewpoints and economic competition. The Commission has a responsibility to consider various aspects of the qualifications of licensees or applicants, among them the question of multiple ownership. In so doing, the Commission acts in individual cases or through rule making. Early in its history, the Commission acted to adopt rules to end common ownership of stations in the same service serving substantially the same area. Needless to say, such commonly owned stations could neither be true competitors nor could they offer true diversity. Since then the multiple ownership rules have been extended in a number of respects to better serve one or both of the above goals. As to competition in particular, the national public policy (expressed in anti-trust laws and elsewhere) in favor of competition and against actions which would curtail it, finds a reflection in the actions of the Commission. Sometimes, this policy will yield, however, to the even higher goals of diversity and the delivery of quality broadcasting service to the American people. This is a vitally important matter, for it is essential to a democracy that its electorate be informed and have access to divergent viewpoints on controversial issues. Needless to say, thought had to be given to how much diversity to seek in terms of providing the best practicable service to the American public.[20]

100. *Prospective Rules.* While there can be no doubt that newspapers brought a pioneering spirit to broadcasting, first in radio and then in television, it does necessarily follow that new co-located coownership always would serve the public interest in the same way. In

[20] Sometimes there can be a clash between the goals of diversity and competition. Such is the situation in *Carroll* cases where we consider whether the addition of a station in a locality would damage an existing station's ability to program in the public interest, and whether the proposed station would function as a substitute for it. Leaving aside the quantum of proof required, at their core these cases say that the loss to the public is of such importance that even the goal of competition must take second place. It should be noted that the Commission's function is not to protect stations from competition and the public interest is not disserved even at a station's demise, so long as another takes its place in providing public service programming.

no way does this suggest a lack of recognition of the efforts made by the pioneers. Rather, it speaks to the issues raised when possible new entrants step forward. Now, unlike then, the broadcast medium has matured. While not all have made profits, for the most part, it is the particular market situation, or the newness of the operation that is the cause. Thus, the special reason for encouraging newspaper ownership, even at the cost of a lessened diversity, is no longer generally operative in the way it once was. Nor are newspapers the sole reservoir of experience on which reliance has to be placed. To the extent that TV (or radio) facilities are worth applying for, qualified and experienced applicants can be expected to step forward. Newspapers are not the only interested parties. The Commission is obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was.

101. The thrust of recent rule changes in the area of multiple ownership as well as the underlying principles go in the direction of increased diversity. It appears that the licensing of a newspaper applicant for a new station in the same city as that in which the paper is published is not going to add to already existing choices, is not going to enhance diversity. In fact, since the number of channels open for filing has vastly diminished, the channel in question may be the last or one of the last available for the community. All this leads us to conclude that steps need to be taken in this regard. We think that any new licensing should be expected to add to local diversity. Accordingly, the rules will bar combinations that would not do so. Not all print media are equal or are generally circulated. Thus, we do not believe that weekly newspapers or specialized publications (including foreign language dailies) need to be included in the prohibitions we are adopting. Their situation would be different, for much of the audience of a station owned by such an entity would receive that entity's views for the first time. Each such publication is a relatively unimportant fraction of the media mix in a particular area. For this reason and because of the sheer size of daily newspapers, we shall limit the rule to daily [21] newspapers of general circulation. For the purpose of this rule, collegiate papers, even if dailies, are not considered to be circulated generally.

102. Since there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership, some limit needs to be placed on the geographic effect of the rule. We have decided to follow the parallel of the multiple ownership rule already adopted in this proceeding which bars new TV-radio combinations within certain specified contours, namely Grade A for television, 2 mV/m for AM and 1 mV/m for FM.[22] The rule would bar newspaper ownership if the predicted contours encompassed the city in which the daily newspaper is published.[23]

[21] For this purpose we are using the print media definition of a daily, i.e., published 4 times a week or more, in contrast to weekly, semi-weekly, or tri-weekly publications.

[22] For an explanation of this rule, see para. 3 and footnote 2, *supra*.

[23] Any concern that this restriction could be avoided by simply proposing facilities sufficiently limited to prevent encompassment can be resolved when it is recognized that the Commission has already designated applications for hearing on "307(b) efficiency" issues when this happened in connection with the current multiple ownership rules. If the multiple ownership situation arguably would lead to artificial restrictions on station facilities, such matters could be explored in hearing.

103. The rule will apply to new ownership patterns however created, whether by initial application and construction or by acquisition. In fact, the latter category is perhaps an even greater cause for concern since there would be a loss of an already existing separate voice if a separately owned station were acquired by a paper. In addition, once a sale is to take place the rule would require a split in an existing combination. No divestiture would be effected nor hardship created since this is a voluntary action by the seller. Thus the rule will apply to all applications for assignment or transfer other than those to heirs or legatees or those for *pro-forma* changes in ownership.[24] In addition to barring daily newspapers from acquiring a station if any of the above-mentioned contours encompass the newspaper community, we shall prohibit grant of a renewal to any station which acquires such a newspaper.[25]

104. The new rule will apply to radio, as well as television applications. While on the one hand it could be argued that the larger number of radio facilities means there already is more diversity than in television, the fact is that we wish to encourage still greater diversity. This to us is a worthwhile goal which does not depend on its being urgent to be justified. Since diversity can be fostered through prospective rules without the fundamental disruption that would occur with altering all current ownership patterns, even a smaller gain is worth pursuing. Also this is the same approach we took in regard to radio-TV combinations, where it, too, could be argued that the numbers suggested no need for concern if a television station acquired a radio station. The effect of the new rule could also be expected to enhance at least to some degree competition in the media.

105. The portion of the multiple ownership rules being amended today has come to be known as the "duopoly" portion of those rules (as contrasted with the seven-station portion). Originally, the duopoly rules proscribed common ownership, operation, or control of two broadcast stations in the same broadcast service serving substantially the same area. Later the proscription was changed to proscribe common ownership, operation or control of two stations in the same broadcast service if specified contours of the stations overlapped (Grade B for television, 1 mV/m for AM and for FM). Then, at an earlier stage of this proceeding, the duopoly rules were amended to cut across broadcast service lines, namely, VHF television and radio. Today they are further amended to include daily newspapers.

106. In discussing duopoly in the preceding parts of this document we have, for the sake of convenience, spoken solely of common ownership of media. However, it is necessary to take cognizance of the other terms in the duopoly rule as well, since not only common ownership is proscribed, but also common operation or control. It is clear that under the original rule, a party owning 100% of an AM station

[24] Parties believing that survival of both entities depends on their joint sale may make such an argument in seeking waiver of this requirement.

[25] As proposed in the *Further Notice*, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of its stations there within 1 year or by the time of its next renewal date, whichever is longer. If the newspaper is purchased less than a year from the expiration of the license, the renewal application may be filed, but it will be deferred pending sale of the station, if necessary, until the year has expired.

was prevented from owning 100% of another AM station serving substantially the same area. However, what if he owned 100% of one station and although having no ownership interest in the other he was a director or an officer thereof? Did such a position constitute "control" of the other station so that the proscription of the rule applied? What if a party had no ownership interest in either station but was a director of each, or was an officer of one and general manager of the other? What if he had a minority stock interest in one and was an officer of the other? Was this proscribed? The Commission, by ruling on such questions on a case-by-case basis over the years, has developed policy concerning them. In the earlier stages of this proceeding we indicated that the policy as originally developed for stations in the same broadcast service would be carried over and applied to such cross-interests in VHF and radio stations (22 F.C.C. 2d 306 at 324–5; 28 F.C.C. 2d 662 at 669–670). In the *Further Notice* (22 F.C.C. 2d 339 at 349) we proposed to apply the policy to any new rules that might be adopted herein with regard to newspapers and invited comments on the subject. Nothing filed in response to this invitation suggests a need for different treatment, and we shall therefore adhere to the policy in administering the new rules adopted today.

107. The Commission's present rules proscribing acquisition of common ownership of stations in different services in the same market apply with full force to VHF television stations. However, as to UHF stations, the prohibitions do not apply. Instead, a case-by-case approach is followed. After careful consideration we have decided not to follow this distinction in connection with newspaper-television common ownership. Arguably, some of the same reasons which applied previously and upon which the distinction was created might be said to be present here. Admittedly, there is some commonality in the two areas of the rules in terms of how we should treat UHF stations, but we see even more that is distinctive. Thus, the level of concern over common ownership of an FM station and a UHF television station (a matter handled on a case-by-case basis) is not the same as with a daily newspaper and UHF stations. The latter combination results in a much more imposing entity in most cases. Sometimes, of course, the broadcast-broadcast common ownership situation would raise a problem; hence we provide for treatment of these cases on an *ad hoc* basis. Here the reverse of the broadcast-broadcast combination situation is to be expected. Presumptively, the creation of new television station-daily newspaper combinations or a sale of an existing combination raises a problem. This may not always be the case, but since parties can seek waiver, there is a protection in the event that in a particular case our approach could be unduly harsh. We wish to act to encourage even greater diversity than we now have and think therefore that UHF should not be exempted as a matter of course. As to the view to be taken regarding the significance of operation on a UHF channel as it relates to the question of possible divestiture, discussed below, we believe that the cases need to be judged on their own terms and not based on any assumption that stations on UHF channels have an inferior position in the market. In only one of the cases where the question of possible divestiture exists does this apply, and from

the information now before us, exemption on this basis would not appear to be warranted.

108. *Divestiture.* We now turn to the most difficult of the questions before us: should divestiture be required? and if so, to what extent? We have been told by some parties that common ownership of a daily newspaper and a broadcast station raises such a problem as to require divestiture wherever the two entities are co-located. To some extent, in making this argument, reliance is placed on the economic strength of the combination, in terms of their revenues or the percentage of the market advertising revenues the two control. Others place reliance on circulation figures to show the power of the combination. In either instance, we are asked to require the current owner to divest in the hope or expectation that a change in ownership would bring public benefits. The principal benefit mentioned by others is the gain in diversity which the new owner would bring. Still others recognizing that disruption would attend the implementation of any such requirement urge it only in egregious cases. In part this is seen as a matter of fairness, in part it rests on the view that the need is not so great in other cases. We remain no less convinced than before of the importance of diversity, but this is not the only point to consider. Our examination of the situation leads us to conclude that we may have given too little weight to the consequences which could be expected to attend a focus on the abstract goal alone. There are a number of public interest consequences which form the basis of our concern. Requiring divestiture could reduce local ownership as well as the involvement of owners in management as many sales would have to be outside interests. The continuity of operation would be broken as the new owner would lack the long knowledge of the community and would have to begin raw. Local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too. None of these points was given consideration when we spoke in more sweeping terms at an earlier stage of this proceeding.

109. In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas. Particularly in connection with a number of entities, there is a long record of service to the public.[26] Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough. Unlike for prospective rules. divestiture introduces the possibility of disruption for the industry and hardship for individual owners.

110. We agree with the Justice Department that the Commission, like any other regulatory agency, must consider the anti-trust impli-

[26] A careful comparison has been made by the Commission's staff between like television stations differing only in whether or not they were owned by newspapers. The findings, attached hereto as Appendix C, show an undramatic but nonetheless statistically significant superiority in newspaper owned television stations in a number of program particulars. This material is derived from material contained in the first annual program report.

cations of its actions. Indeed, the relationship between anti-trust law and administrative law is necessarily a complementary one in which "the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of the anti-trust law is the same." *Northern Natural Gas Co.* v. *F.P.C.*, 399 F. 2d 953 at 959 (D.C. Cir. 1968). On the other hand, as Judge Wright succinctly stated in *Northern Natural Gas Co., supra*, 399 F. 2d at 960–961:

> This is not to suggest, however that regulatory agencies have jurisdiction to determine violations of the antitrust laws. See *People of the State of California* v. *F.P.C., supra*, 369 U.S. at 490, 82 S. Ct. 901; *United States* v. *Radio Corporation of America, supra*, 358 U.S. at 350, n. 18, 79 S. Ct. 457; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223–224, 73 S. Ct. 990 (1943); *Mansfield Journal Co.* v. *FCC*, 86 U.S. App. D.C. 102, 107, 180 F. 2d 23, 33 (1950). Nor are the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest'." *F.M.C.* v. *Aktiebolaget Sevenska Amerika Linien, supra*, 390 U.S. at 244, 88 S. Ct. at 1009.

Accordingly, we have analyzed the basic media ownership questions in terms of this agency's primary concern—diversity in ownership as a means of enhancing diversity in programming service to the public—rather than in terms of a strictly anti-trust approach. Indeed, we have taken into consideration such matters such as potential disruption of the broadcast industry which may not have been relevant from an antitrust analysis, but are intimately involved with important public interest considerations which this agency cannot ignore.

111. The distinction between our approach and the Justice Department's is best put this way. Justice and others applying traditional anti-trust criteria are primarily interested in preserving competition in advertising.[27] They place a greater emphasis on public policies underlying the need to preserve competition than on diversity aspects and for their arguments they use analytic tools taken from economic studies of market share and the like. Conversely, the diversity approach would examine the number of voices available to the people of a given area.[28] The premise is that a democratic society cannot function without the clash of divergent views. It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility. If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. This is not a reflection on the efforts of combination owners in diligently serving the public interest. Rather, it is a recognition that it is unrealistic to expect true diversity from a commonly owned station-newspaper com-

[27] This is not to suggest that we agree that any showing of higher prices has been made. The point was simply that Justice has applied a traditional competitive view whereas the Commission needs to look to other, even more vital, concerns as well. So it is too with the de Jonckheere approach to examining market concentration that does not give adequate attention to the core concern: diversity of programming service to the public.

[28] The Seiden approach is totally unrealistic in its inclusion of any publication or station that reaches even a small fragment of the market and moreover deals not at all with local issues.

bination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.

112. Having said that our primary concern is diversity in programming service, we have analyzed the question of requiring full-scale divestiture under standards and with regard for considerations which are relevant under our broad public interest mandate. This does not mean that the Justice Department's concern for economic competition is irrelevant; only that it is of secondary concern under the Commission's regulatory responsibilities.[29] After reviewing the record in this context, we believe that because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases.[30] We have examined instances where there is co-located common ownership of a daily newspaper and a television and/or radio station to see which situations, if any, required action. In doing so we had to select some standards. As in all such efforts, the standards are not necessarily the only ones that could have been selected. We think the ones we have chosen are suitable and in fact preferable to other possible formulations. Nevertheless, we recognize that others would have preferred more or less stringent standards. A choice had to be made, and it had to rest on a valid and comprehensive foundation. We think it does, even if it is not the only possible formulation or does not represent the only point at which a balance could be struck. Before describing the standards it might be

[29] We shall examine allegations of economic monopolization which might warrant actions under the Sherman Act on an *ad hoc* basis in the future in those remaining circumstances where monopolization arguments might still be raised. (See para. 130, *infra*.) Moreover, we note that the Department of Justice, rather than submit data upon which industry-wide divestiture could be based, has offered general observations regarding the need for media competition and its concern about daily newspaper-VHF television combinations. Other parties have not had a proper opportunity to address the Department's separate filings with respect to the renewal applications for several stations and we doubt, in any event, that they would provide an appropriate basis for formulation of a general standard. Action on these pleadings will be taken in connection with the renewal applications in question. The Department has not offered us specific data in this proceeding on which to rely in applying anti-trust standards. Instead, it says that we are under an obligation to consider the competitive principles underlying the anti-trust laws. While we agree fully, we do not find that the data before us provide a footing for more severe action than we are taking. Divestiture has a substantial impact, and should be required only when we can determine that it is required by the public interest. We agree that it is not necessary to have proof of abuses before we can act, and we recognize that trading of stations would tend to lessen concern based on financial losses or investment uncertainty. However, we do not think that these considerations are a substitute for the requirement of a stronger showing than we have of the need for such a severe remedy on a broader basis. Even if some disruption occurs, we have acted to divest where competition and diversity are absent. Extending this to apply to all newspaper-television combinations, regardless of competition, is not warranted on the record before us and would cause serious public injury. We cannot rest upon an assertion that pricing may not be as competitive simply on the basis that it is "reasonable to assume" so. Merely stating that all daily newspaper-VHF television combinations are inconsistent with the public interest and the anti-trust laws is not enough. The Department urges that the degree of concentration is striking, but at present, 79 television stations are owned partly or wholly in common with daily newspapers published in the same locality. This number represents about 10.4% of the 757 commercial television stations on the air. If newspaper stations elsewhere are included the figure nears 14%, which is far below the 48% figure that obtained in 1948. A similar pattern of a continuing separation of daily newspapers and television stations in the same locality can be observed during the period of this proceeding. Thus, the 1970 figure of 96 co-located newspaper-television combinations dropped to 94 the next year and to 83 by April of 1974. By July of 1974 the figure had dropped still further to 79. Further reduction will take place as a result of our action here and through continuation of already begun changes in patterns of station ownership. We have drawn a line that is based on competition as well as diversity of voices and our experience suggests that there is neither need nor wisdom in going beyond it.

[30] There is another point, too, that with prospective rules as is the case with new applicants, even a small gain in diversity can be the basis for the requirement. Far more must be shown to warrant forcing an entity to dispose of its interest, and many cases lack any such urgency.

helpful to explain the criteria we used. We were greatly concerned about a lack of diversity that reaches a point sufficient to constitute an effective monopoly in the marketplace of ideas as well as economically. This did not mean, for example, that no magazines or other periodicals entered the market, or that no other radio or television station could be received there. Aside from the fact that such media outlets often had only a tiny fraction in the market, they were not given real weight since they often dealt exclusively with regional or national issues and ignored local issues. If they did deal with locally oriented issues, it was their own locality that was the focus. Such a situation does not bespeak a real diversity on vital issues of local concern. In fact, it is local issues on which so much decision making by the electorate is required, and on which the level of diversity provided by incoming media is lowest. Accordingly, we made an effort to determine whether diversity, real community-wide diversity, was present on such topics of local concern. As to prospective interests, we concluded that we were free to act to foster diversity without being concerned about negative impact from our action. As to interests already in existence, however, we concluded that a recognition needed to be given to such concerns and we used as a guideline whether a single full-fledged choice was available. We thought it would suffice, provided it was one which could be expected to deal with matters of local concern. In such cases there would not be such an unacceptable level of undue concentration. We looked then to incoming signals as a basis for exemption from divestiture.[31]

113. We examined all the instances known to us [32] of common ownership of the only daily newspaper with the only local radio or television station. Not all, it turned out, represented true monopoly situations, and stations were removed from the list if a direct competitor was found. In some of these instances, although only one station might be licensed to a city (such as Norfolk, Virginia) the truth is that the industry and local residents alike perceive the other stations licensed to other cities in the area (in that case Tidewater, Virginia which includes the cities of Hampton, Portsmouth and Newport News) as local, and they so function in terms of responding to local problems. In such cases, there is true (even if not unlimited) diversity. Sometimes, the situations were not so clear-cut.

114. Ascertaining and endeavoring to serve local needs was the key point, and some standard had to be developed to indicate where this was a reasonable expectation and where it was not. We did not believe that determining that a signal (regardless of whether it was city-grade, Grade A or Grade B) could be received, would suffice. We drew the line so as to require encompassment of the newspaper locality [33] by the

[31] Of course a daily newspaper competitor would equally well suffice to remove the combination from the ambit of the rules, but in these cases none were found.

[32] While we are reasonably sure about the information in question, absolute certainty is not possible. Neither at the Commission nor in any trade publication (print or broadcast) is there a definitive list of these common ownership situations. This information is called for only indirectly in station ownership reports and they are at best only a partial source of information. As a result we contemplate a change in the ownership reports to have specific disclosure of all media ownership.

[33] Although the rule does not rest on this premise, in each instance the location is identical to that of the co-owned station's community of license.

city grade signal [34] of another commercial television (or radio) station.[35] There are two reasons for selecting this standard. First of all, dependable coverage of the community in question would be provided, but even more importantly, because of the proximity of the station to the city in question, such stations could be expected to serve the needs of the newspaper locality as well as their own. While it is true that another signal level could have been used if we were only concerned with reception of the station, we do not believe that this would have been satisfactory. We think the focus properly belongs on the responsiveness of the outside station to local problems and needs. While the entertainment offerings of more distant stations garner many viewers, such is not the expectation for public affairs programs. Even if many did watch, little of this material could be expected to deal with problems of the newspaper community. It is unrealistic to imagine that these outside stations, not providing a city-grade signal, would be able to give meaningful responses to the needs of the distant newspaper locality, and it would be unfair to impose any such burden on them to attempt it. It is for these reasons that we cannot base our decision on overall viewing patterns as such. Rather, it must be on whether an outside station can be expected to provide meaningful attention to local problems and issues. Some would argue, no doubt, that all of these monopoly situations require divestiture even if a city-grade signal of an outside station encompasses the city in question. We see several problems with such an approach. First, some of these cases are labeled monopolies arbitrarily because only one channel is licensed to a particular city even though others are licensed to cities which together are part of a hyphenated market. Sometimes the residents of the individual communities themselves think of the area as joined together in the sense that local problems and their solutions transcend the borders of the separate cities involved. In such situations, the other stations in the market do direct themselves to the problems faced in common. In fact a question might well be raised in such situations if they did not do so. Even in situations where the communities involved are not so tightly bound, we believe that the attention to local problems outside stations could be expected to provide is sufficient to demonstrate the existence of adequate diversity. This is premised on the

[34] For AM and FM, the city-grade signal levels are 5 mV/m and 3.16 mV/m, respectively. For all stations, encompassment by a city-grade signal means the same as encompassment by a principal community contour.

[35] The question immediately arises of what to do about translators and satellites. As to the former, little could be expected in terms of coverage of diversity. The station whose signal is translated is often quite far away and the existence of a translator has no bearing on the stations' obligation regarding ascertainment of community problems. In effect then, even if the translator provides a dependable signal throughout the monopoly community, it cannot be relied upon to bring in a service attuned to the needs of the monopoly community. Satellites present a more difficult problem as they do operate with more substantial facilities and the primary station is obliged to carry some programming attuned to the needs of the satellite community. We do not believe that this is sufficient to demonstrate diversity unless the satellite has a local studio from which public affairs and news programs can and do originate. Such a station (in effect a semi-satellite) would suffice to demonstrate diversity. Educational stations are not under an obligation to provide the full range of responsive programming as are commercial stations, and we cannot ignore their specialization. It is more than lack of commercials that sets them apart. Since they cannot be equated with commercial stations, we shall not exempt based on encompassment by an educational station. So too with foreign stations which have no obligation to serve the needs of their American audiences or to deal with issues of concern to them.

efforts of these stations to ascertain and endeavor to serve the needs of a monopoly community which they encompass with a city-grade signal,[36] efforts which need be undertaken. Although we continue to believe that divestiture is a harsh remedy, one to be reserved only where the need is overwhelming and the evidence unambiguous, it is equally clear that in some circumstances, no other answer can be given. We believe such to be the case where two city-grade signals are not present that offer an effective juxtaposing of views on local issues. In our view, this country can ill afford a monopoly on the expression of views of issues of local concern. This basis for divestiture, however, is a far cry from one based only on some theoretical increase in already existing diversity which might follow from such action and would ignore the ramifications of such a step. Accordingly, we do not believe that further divestiture can be defended.

115. Up to this point we have not attempted to distinguish radio stations from television stations in terms of the need for divestiture or to indicate the reasoning underlying our views on each. As will be clear from the discussion which follows, we are applying the same standards to a radio monopoly co-owned with a monopoly newspaper as we have to a television monopoly with a newspaper connection. Radio and television are given parallel treatment, based on encompassment by a city-grade signal. We are not unaware of the fact that in the cases where the television station and newspaper are the only ones of each in the locality, a city-grade radio signal may very well encompass the city.[37] This fact, in our view, is not sufficient to change matters. Realistically, a radio station cannot be considered the equal of either the paper or the television station in any sense, least of all in terms of being a source for news or for being the medium turned to for discussion of matters of local concern. When the weight of a daily newspaper and the commonly owned television station (perhaps with a radio station or even an AM–FM combination under common control) are combined, the radio station standing by itself cannot be considered as providing significant diversity or as constituting a meaningful competitor at all. Accordingly, the rule shall not provide an exemption based on encompassment of the monopoly television-newspaper community by a radio station as would be the case for encompassment by a television station. Weekly newspapers, likewise, have too small an impact in comparison to the daily newspaper-television station combination to provide a basis for an exception.

116. As to the situations where there is no local TV station and the only radio stations are owned in common with the only daily newspaper, we are of the view that the combined importance of the daily newspaper and the radio station(s) [38] is akin to that of a television-newspaper combination in the television cities. It must be remembered

[36] Stations have a secondary obligation to provide service to areas outside their city of license. In a number of instances stations which place city-grade signals over monopoly communities are addressing themselves to the problems, needs and interests of those communities. Stations in a similar posture should recognize and undertake to serve, on a secondary basis, these monopoly communities.

[37] In fact, such ordinarily would be our expectation, as a community large enough to support a television station could be expected to have a number of radio stations, at least one of which would be separately owned from the newspaper.

[38] In some instances AM stations alone, in others AM–FM combinations.

in this connection that there is no local television station to which the local residents can turn and in most cases no incoming city-grade television signal from another community. (In one case, that of Miles City, Montana, there is a television station licensed to serve that community, and we believe this fact sufficient to demonstrate adequate diversity.) Also, because of the much greater number of licensed radio stations, the expectation would be that a choice of signals would be the norm. Thus, the places lacking any other city-grade radio signal [39] could be viewed as isolated. In the smaller non-television communities, radio stations play a truly vital part in local affairs and their efforts and importance can exceed the level reachable by television stations in larger markets. These media outlets are a much more central focus in these smaller communities. Even if a television city-grade signal encompasses the newspaper-radio monopoly community it does not follow that the station would provide effective diversity in that community. The outside television station would not be expected to be attuned to meeting the local problems, needs, and interests of these smaller newspaper-radio communities.

117. The rules we have fashioned will prohibit the monopoly situations described above and will require divestiture no later than January 1, 1980.[40] In the case of newspaper-television station monopolies either property could be sold.[41] In the case of radio-newspaper monopolies either the newspaper or a radio station would have to be sold, so if there were an AM–FM combination involved, the affected party need only dispose of one of the stations.[42] Since AM–FM combinations are not precluded by the rules, the AM–FM combination could be sold together.[43] Our goal, the creation of a competing source of news and public affairs programming attentive to the needs of the locality, could be thwarted if appropriate protections were not included to insure compliance with the requirements of the new rules. Thus, for example, there is a need to protect against a station's being offered for sale at a price out of keeping with its true value so that the owners could seek waiver on the basis of the inability to dispose of the station. We expect the parties involved to proceed in good faith. In connection with any attempt to show the inability to dispose of an interest to conform to the rules, we shall not give any weight to a showing that does not include a full description of the effort made to sell that interest, the price at which it was listed and a certification of a station (or if it applies, newspaper) broker that in his view this price is consistent with the fair market value of the station (or newspaper) in question.

[39] The reference is to daytime coverage, and the reason for this is quite simple: the data on file at the Commission do not suffice to give an accurate current picture of nighttime AM coverage without the most painstaking examination of each case and a total restructuring of the maps and other data submitted by the stations to take into account all subsequent developments.

[40] This period of five years represents to us a proper balance between the private equities involved and the need for such dispatch as circumstances allow.

[41] If the present owner preferred, both the newspaper and the station could be sold but it would have to be to separate buyers.

[42] Some of the affected AM stations are full-time stations; others are daytime-only. Compliance may be achieved by divesting either of the stations regardless of its hours of operation, or by divesting both if that is preferred.

[43] We would not consider it compliance if a station were acquired solely to be divested and our expectation is that divestiture of a station not yet on the air would not constitute compliance with the rules.

118. We anticipate a number of waiver requests. The following discussion sets forth some of the circumstances in which waivers, either permanent or temporary, might be granted.[44]

119. It is not our intention that the rules should work a forfeiture.[45] The rules are not in the least premised on the existence of improprieties in the operation of the media holdings. Thus, only a sale, not a loss is contemplated. For this reason, inability to sell the station would be a basis for waiver. Otherwise a refusal to grant a further renewal of license to the present licensee would work a forfeiture, a result contrary to our intent. We would take a similar view if the only sale possible would have to be at an artificially depressed price.[46] Likewise, if it could be shown that separate ownership and operation of the newspaper and station cannot be supported in the locality, waiver might well be appropriate. In any of these instances we contemplate waivers of reasonable duration, so that we shall not always be bound by a result based on outdated information. Finally, if it could be shown for whatever reason [47] that the purposes of the rule would be disserved by divestiture, if the rule, in other words, would be better served by continuation of the current ownership pattern, then waiver would be warranted. However, we would not be favorably inclined to grant any request premised on views rejected when the rule was adopted, as we do not intend to relitigate resolved issues.

120. On our own motion, in two cases we are exempting stations from divestiture because it is clear that for each case a waiver would be warranted. At Hickory, North Carolina, the television station operates on a UHF channel with highly limited facilities and without a network affiliation. Whether by net weekly circulation or any other measure, the station, its audience and hence its impact, is minor. Consequently, there appears to be little basis for expecting any interest to be shown in acquiring this station. With Brookfield, Missouri, in the radio station list, it is equally clear that it is not on equal footing with the others in the group. By various indicia, both the station and the community are significantly different from the others. To neither of the above licensees would it be fair to insist that they go to the expense of filing a waiver request when the outcome is clear. Therefore we shall act now.

121. As to others desiring waiver we wish to make it clear that we do not contemplate holding evidentiary hearings on the individual

[44] The stations required to divest are listed in Appendix D and Appendix E to this document. As explained earlier (see fn. 33), the list is not to be taken as definitive. There may be additional stations within the ambit of the rules that do not have city-grade encompassment but nonetheless were not found in our search. Conversely, we may have included stations in the list that do not fit within the ambit—that for one reason or another should not have been included. Licensees of such stations can call such situations to our attention.

[45] Nevertheless, in recognition of the fact that we are requiring divestiture, we shall issue tax certificates to these parties pursuant to 26 U.S.C. 1071. We shall also do so in non-divestiture cases where current combinations are sold to separate owners in order to come into compliance with the new policy underlying the rule. We took this view earlier in this proceeding as to broadcast combinations—see the 1971 Memorandum Opinion and Order (28 F.C.C. 2d 662 at 671) and the Public Notice of July 16, 1970, FCC 70-744.

[46] An appropriate showing would have to be made of the fair value and the inability to obtain such a price. Also, as with inability to sell at all, we do not contemplate permanent waiver, for problems in disposing of these interests would not be expected to endure indefinitely.

[47] Among others that parties may wish to bring to our attention are local access or origination on the community's cable television system or other special circumstances they think have a bearing on the appropriateness of granting waiver.

waiver requests unless there are substantial issues of fact to be resolved. Legal, as distinguished from factual issues, can just as well if not better be resolved without the need for an evidentiary hearing. An evidentiary hearing on the other hand could only cause delay and unnecessary expense to all concerned. There is no requirement for the holding of an evidentiary hearing imposed by law absent the raising of substantial factual issues and we shall not take on a pointless task.

122. The current state of the economy may suggest to some that any station sales could only be at a depressed price, but as pointed out previously, there is no need to sell now if it is more advantageous to wait. With a 5-year grace period for compliance, particular market conditions or even an overall market down turn would not provide a basis for obviating the divestiture requirement, unless such a condition were to last the full five-year period. Such a turn of events does not seem plausible, but even if we thought it were, any action on this basis would have to await future happenings. In the meantime, we expect that parties wishing to seek waiver of the divestiture requirement will file their requests within 6 months of the publication of this document in the Federal Register. This should be sufficient time to properly assay the applicable circumstances and to prepare even a lengthy request. We are not prepared to consider late-filed requests unless based on changed circumstances which would not have been anticipated.

123. *Miscellaneous Matters Relating to New Rules.* We have been urged to exempt Puerto Rico from any rules we might adopt. Whatever action might have been required if any divestiture were to take place there, the fact is that no divestiture is required. The arguments we have been offered dealt mostly with existing and not future ownership combinations. In our view, the need for diversity is no less great in Puerto Rico than elsewhere, and we see no less need to apply the prospective rules there. To the extent a prospective applicant believes that special circumstances warrant deviation from the new requirements, it is at liberty to seek waiver to permit acceptance of a nonconforming application.

124. The suggestion has been made that we should act to help insure that ownership of any divested station should pass to minority group ownership. Secondarily we were urged to act similarly to encourage assignment to local (preferably minority) owners. The trouble with this request is that it appears to run afoul of Section 310(b) of the Communications Act of 1934, as amended. That provision specifically bars the Commission from considering whether the public interest would be served by transferring ownership to a party other than the one proposed in the application filed with the Commission. We inquired of the party urging this approach how it could be done consistent with Section 310(b) and were not offered any persuasive basis for believing it could be done. Accordingly, we shall not adopt such a requirement even obliquely as we were urged through requiring the assignor/transferor to attempt to find a buyer in keeping with the priorities urged by NCCB. However, it is clear that few stations are licensed to minority group owners. Divestiture might be an occasion for affected parties to consider this fact in reaching their decisions, but no requirement to this effect will be adopted.

125. *Impact on comparative hearings involving regular renewal applicants.* Under the rules adopted herein, only a small number of co-owned broadcast-newspaper combinations are required to divest and no co-owned TV-radio combinations must do so. This raises a question as to the effect our action taken today will have on comparative renewal proceedings when licensees not required to divest apply for renewal of license and are challenged by a competing applicant. The answer to that question lies in the following discussion of our 1970 "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants" (22 F.C.C. 2d 424).

126. In that statement we attempted to balance the benefits received by the public from the statutory spur inherent in the fact that there can be a challenge at renewal time against the value of not undermining predictability and stability of broadcast operation. The balance was struck by adopting a policy which provided that if a renewal applicant could show in a hearing with a competing applicant that its program service during the preceding license term had substantially met the needs and interests of its area (and that the operation of the station had not been characterized by serious deficiencies) the renewal applicant was given a controlling preference over the new applicant. In adopting this policy, we stated that as to the Commission's rules and policies governing diversification of the media of mass communications, where a renewal applicant with other media interests had in the past been awarded a grant as consistent with those rules and policies and thereafter rendered service that substantially met the needs and interests of its area it would be unfair and unsound to permit him to be ousted on the basis of a comparative demerit because of his media holdings. Our position was that as a general matter the renewal process is not an appropriate way to restructure the broadcast industry. Rather, we stated, this should be done in rule making proceedings.

127. The 1970 Policy Statement was struck down by the Court in *Citizens Communications Center* v. *F.C.C.*, 447 F. 2d 1201 (1971). The basis of the Court's action was that in a comparative hearing involving a regular renewal applicant, the Communications Act and *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945), require a single full hearing in which the parties may produce evidence and be judged on the basis of all relevant criteria. It was the view of the court that the 1970 Policy Statement provided for a full comparison of the renewal applicant and the challenger only in cases where in the initial stage of the hearing the incumbent could not show a past record of substantial service without serious deficiencies. In other cases, the Court said, the challenger was given no hearing at all.

128. In ruling the 1970 Policy Statement illegal, the Court said (at fn. 33):

> Thus, without impinging at all upon the Commission's substantial discretion in weighing factors and granting licenses, our holding today merely requires the Commission to adhere to the comparative hearing procedure which it has followed without fail since *Ashbacker* and which has rightly come to be accepted by observers as a part of the due process owned to all mutually exclusive applications.

However, in such a single full comparative renewal hearing the Court observed that superior performance by an incumbent licensee should

be a plus of major significance. This is because "[t]he court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." (At fn. 35.) Nonetheless, it was the Court's view that "[d]iversification is a factor properly to be weighed and balanced with other important factors, including the renewal applicant's prior record, at a renewal hearing." (At fn. 36.)

129. After the decision in *Citizens Communications Center*, the Commission (noting the doubts expressed by the Court as to procedures made by the Commission in adopting the 1970 Policy Statement) issued a Further Notice of Inquiry in Docket No. 19154 (31 F.C.C. 2d 443 (1971))[48] inviting views of interested parties on the formulation of policy in this area that would be consistent with the Court's holding that a full hearing is required. That proceeding is still pending. The Commission has recently announced its intention to consider in the near future what its policy should be in this regard, but has not yet resolved the point. In the light of *Citizens Communications Center*, whatever policy is developed will take into account diversification as a factor that must be considered in a comparative renewal hearing. Also in the light of that case, the weighing of factors lies within the substantive discretion of the Commission, and the weight to be given the factor of diversity in comparative renewal hearings remains to be determined. Until such time as a new policy is formulated in Docket No. 19154, of necessity, under *Citizens Communications Center*, the factor of diversification must be considered in comparative renewal hearings, but the weight to be given that factor will be a matter within the discretion of the Commission. In connection with both any policy that may be developed and with comparative renewal proceedings that may occur before the development of such policy, we reiterate what we have said on another occasion (31 F.C.C. 2d 443 at 445), that we do not believe the Court in *Citizens Communications Center* is seeking to have the ownership patterns of the broadcast industry restructured through the renewal process; that, rather, any *overall* restructuring should be done in a rule making proceeding. And what we consider to be the necessary *overall* restructuring has been done today.

130. During the pendency of this proceeding, in situations involving petitions to deny renewal applications, the Court has approved our policy of refusing to consider questions of concentration of control unless specific abuses are shown. (*Hale* v. *F.C.C.*, 425 F. 2d 556 (D.C. Cir. 1970); *Stone* v. *F.C.C.*, 466 F. 2d 316 (D.C. Cir. 1972); *Columbus Broadcasting Coalition* v. *F.C.C.*, —— F. 2d —— (D.C. Cir. 1974.)) Parties as of now may raise concentration issues in connection with such petitions. However, absent a showing of economic monopolization that might warrant actions under the Sherman Act, it would not be our view that such arguments would raise valid issues necessitating the designation of renewal applications for hearing. (See fn. 29, *supra*.) We should make clear at this time that since the stations which are subject to the divestiture provisions are in effect under an order to terminate their present cross-ownership there would be no point in

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[48] The Commission had previously issued a Notice of Inquiry in that docket (27 F.C.C. 2d 580 (1971)) to explore whether standards of "substantial service" could be developed for television broadcasting.

conducting protracted comparative hearings concerning those facilities during the interim period. Our finding that divestiture is required would obviously weaken their position in a comparative proceeding, but since we have determined that their present operations should be divested without regard to the quality of their service, as a means of improving the pattern of ownership, we think it would be inequitable to subject them in their present posture to competitive challenge. Furthermore, any comparative hearings at renewal time would probably run through the date when divestiture must be accomplished; this would create a chaotic situation. In view of these considerations, interested parties should be advised that we do not contemplate conducting comparative hearings in the usual course when these licenses come up for renewal.

131. *Policy Regarding Non-Divestiture Combinations.* As we had occasion to observe in the earlier discussion of the comments, a number of parties argued for (or suggested as a substitute for a separation in ownership) requirements to insure separate operation of jointly owned media entities. Although we were not persuaded that their arguments offered a valid basis for obviating the need for divestiture, or for requiring separation in ownership on a prospective basis, we are persuaded that valid points exist in this argument. Various combination owners have stressed that their two media interests—print and broadcast—are operated separately. Even if separate operation cannot be equated with separate ownership, it is nonetheless an important point. Were it otherwise and the two operated jointly, it might have been necessary for the Commission to act to require divestiture in many more situations. If the power of the print-broadcast combination were exercised monolithically or if the print and media outlets were mirror images of one another, speaking with one voice, we would have to be concerned. In the divestiture cases, we held that even in the absence of specific abuses, the need to provide at least minimal diversity required action. As to the remaining instances of combination ownership, we believe some clarification in our expectations is required.

132. Many of the parties owning newspapers and broadcast stations in the same locality described how the two entities—print and broadcast—were separately operated. We were told that separate editorial and reportorial staffs were utilized. Many pointed to a separation in sales staff and an emphasis on competition between media. We endorse such efforts to insure a maximum of diversity and competition possible under the circumstances of common ownership and we commend those conscientious owners for their efforts.[49]

133. Based on the foregoing discussion, IT IS ORDERED, pursuant to the authority contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended, That Sections 73.35, 73.240 and 73.636 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix F, effective February 12, 1975, the date of publication of this document in the Federal Register. All

[49] We do not intend any change in the traditional view taken regarding activities by the media which run afoul of the anti-trust laws. Common ownership in itself does not constitute an abuse. The subject of combination rates and joint sales practices is under consideration in a rule making proceeding in Docket No. 19789.

applications not granted by that date shall be subject to the new rules. Since these rules embody important new policy having widespread effect, we believe that it is in the public interest to make the effective date February 12, 1975, rather than to delay the effective date to a time at least 30 days after publication in the Federal Register. 5 U.S.C. 553(d)(3).

134. IT IS FURTHER ORDERED, That the provisions of newly adopted Section 73.35(c) barring common ownership of the only AM station and a daily newspaper, and Section 73.636(c) barring common ownership of the only television station and daily newspaper ARE WAIVED insofar as they apply to such existing newspaper-broadcast combinations in Brookfield, Missouri, and Hickory, North Carolina.

135. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

PARTIES FILING COMMENTS AND REPLY COMMENTS IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING IN DOCKET NO. 18110

Advance Publications
The Alexandria Gazette
All Channel Television Society
Allied Daily Newspapers of Washington
American Broadcasting Companies, Inc.
American Institute for Political Communication
American Newspaper Publishers Association
Argus-Press Company
Arkansas Democrat Company
Arkansas Television Company
Auburn Publishing Company
Baton Rouge Broadcasting Co., Inc.
A.H. Belo Corporation
Robert W. Bennett
Joseph F. Biddle Publishing Company
Broadcast-Plaza, Inc.
Broadcasting and Film Commission, National Council of the Churches of Christ in the U.S.A.
Brockway Company
Buffalo Evening News, Inc., et al
Bulletin Company
Canton Daily Ledger
Capitol Broadcasting Company
Capitol Broadcasting Company, Inc.
Carter Publications, Inc.
Cedar Rapids Television Company
Channel 6, Inc.
Chronicle Publishing Company, et al
Coffeyville Publishing Company, Inc.
Columbia Broadcasting System, Inc.
Columbus Broadcasting Company, Inc.
Cosmos Broadcasting Corporation
Cox Broadcasting Corporation
Daily News
Daily News-Tribune
Daily Pantagraph
Daily Press, Inc.
Daily Record
The Day
Denton Record Chronicle
Dodge City Broadcasting Co., Inc.
Duhamel Broadcasting Enterprises
Easton Publishing Company
Elyria-Lorain Broadcasting Co.
Enterprise Publishing Company
Evening News Association
Evening Star Newspaper Company
Express Communications, Inc.
Finley Broadcasting Company, et al
Fisher's Blend Station, Inc.
Florida Publishing Company
Helene R. Foellinger
Fort Myers Broadcasting Company
Forum Publishing Company, et al
Forward Association
Forward Communications Corporation
C. D. Funk
Galesburg Broadcasting Company
Gazette Printing Company, et al
Gazette Publishing Company
General Electric Broadcasting Company, Inc.
Richard Gilkey
Gray Communications Systems, Inc.
Green Bay Newspaper Company
Grit Publishing Co.
Guaranty Broadcasting Corporation
Guy Gannett Publishing Co., et al

PARTIES FILING COMMENTS AND REPLY COMMENTS IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING IN DOCKET NO. 18110—Continued

Ethel C. Hale, et al
Hearst Corporation
Herald Association, Inc.
Herald Corporation
Houston Post Company, et al
William F. Huffman Radio, Inc.
HUSE Publishing Company, et al
Illini Publishing Company
Illinois Broadcasting Company, et al
International Broadcasting Corporation, et al
Jacksonville Journal Courier Co.
Jefferson Standard Broadcasting Co.
Jet Broadcasting Co., Inc.
Terrall M. de Jonckheere
Journal Company
Journal Review
Kansas State Network, Inc.
Kenosha News
Kid Broadcasting Corporation
KMSO-TV, Inc., et al
KGVO Broadcasters, Inc. and KMSO-TV, Inc.
KSLA-TV, Inc.
KUTV Inc., et al
Lawrence Daily Journal-World
Harvey J. Levin
Lexington Heraldleader Co.
Ed Livermore
Macomb Daily Journal
Marshfield News-Herald
McClatchy Newspapers
McClure Newspapers, Inc.
Medford Daily Mercury
Medford Mail Tribune
Meyer Broadcasting Company
Michigan Press Association
Mickelson Media, Inc., et al
Midcontinent Broadcasting Company
Midnight Sun Broadcasters, Inc.
Midwest Radio-Television, Inc.
Midwestern Broadcasting Company
Minneapolis Star and Tribune Company
Mississippi Publishers Corporation
The Monitor
Multimedia, Inc.
National Associations of Broadcasters
Exhibit A
Exhibit B
Exhibit C
Exhibit D
Exhibit E
National Broadcasting Company, Inc.
National Newspaper Association
Nebraska Broadcasters Association
New England Daily Newspaper Association
Newhouse Broadcasting Corporation
The New Mexican
New York News, et al
North Carolina Association of Broadcasters
North Carolina Television, Inc.
Ogden Newspapers
Ohio Newspaper Association
Oklahoma Broadcasters Association
Oklahoma Press Association
Owensboro Publishing Company
Paducah Newspapers, Inc.
R. W. Page Corporation
Palestine Herald-Press Company
Palmer Broadcasting Company, et al
Palmetto Radio Corporation
Peninsula Newspapers Incorporated
Pioneer Valley Broadcasting Co., et al
The Post Company
Pottsville Republican
Progress Broadcasting Corporation
Progressive Publishing Company, Inc.
Pulitzer Publishing Company
Quality Broadcasting Corporation
Quincy Newspapers, Inc., et al
Radio Medford, Inc.
Reporter Printing Company
Ridder Publications, Inc.
Rock Island Broadcasting Company, et al
James N. Rosse
Salina Radio, Inc.
Santa Barbara News-Press
Sarkes Tarzian, Inc.
John C. Schmarkey
Scottsbluff Daily Star-Herald
Scranton Times
Scripps-Howard Broadcasting Company, et al
South Bend Tribune
Southern Minnesota Broadcasting Company
Stanford University, Research Center in Economic Growth
Stauffer Publications
Students' F.C.C. Study Group
Summit Radio Corporation
Telegraph-Bulletin
Telemundo, Inc., et al
The Times Company
Times Herald Printing Company
Triangle Broadcasting Corporation
Tribune Company, et al
Tribune Publishing Company
Truth Publishing Company, Inc., et al
United States Department of Justice
Vindicator Printing Company, et al
George R. Walker
Washington Post Company, et al
WBNS-TV, Inc., et al
WEEU Broadcasting Company
Westinghouse Broadcasting Company, Inc.
West Virginia Radio Corporation

PARTIES FILING COMMENTS AND REPLY COMMENTS IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING IN DOCKET NO. 18110—Continued

WFLA, Inc.
WGAL Television, Inc., et al
WHAS, Inc.
Wichita Falls Times, et al
Williamson County Sun
Wisconsin Daily Newspaper League
WJAC, Incorporated, et al
WKBN Broadcasting Corporation
WKRG-TV, Inc.
The Woonsocket Call
World Publishing Company
WSM, Incorporated

PARTIES FILING REPLY COMMENTS

American Newspaper Publishers Association
Stephen R. Barnett
City Club of New York
Donrey, Inc.
Alfred H. Hemingway, Jr.
Dr. Harvey J. Levin
McClatchy Newspapers
National Association of Broadcasters
National Newspaper Association
Tribune Company, et al
WGAL Television, Inc., et al

PARTIES FILING COMMENTS IN RESPONSE TO MEMORANDUM OPINION AND ORDER ANNOUNCING ORAL ARGUMENT

American Broadcasting Companies, Inc.
American Newspaper Publishers Association
Les Anderson
Charles A. Baer
Buffalo Evening News, Inc. and WBEN, Inc.
Center for Policy Research, Inc.
Channel Two Television, Inc.
Chronicle Publishing Company and Chronicle Broadcasting Co.
Civil Liberties Union of Alabama and The Selma Project
Columbia Broadcasting System, Inc.
Cox Broadcasting Corporation
Donrey, Inc.
Duhamel Broadcasting Enterprises, Inc.
Effingham Broadcasting Company
Evening News Association, Lee Enterprises, Incorporated, and WKY Television System, Inc.
Gardner Advertising Company, Inc.
Houston Post Company (see Channel Two Television, Inc.)
Huntingdon Broadcasters, Inc.
Illinois Broadcasting Co., Inc. and Lindsay-Schaub Newspapers, Inc.
Justice, U.S. Department of
KCEN-TV (Channel 6, Inc.)
KSL, Incorporated
Labor Union News, Inc.
McClatchy Newspapers
McKenna, Wilkinson & Kittner
Metromedia, Inc.
Midwest Radio-Television (WCCO)
Minneapolis Star and Tribune Company
National Association of Broadcasters
National Broadcasting Company
National Citizens Committee for Broadcasting
National Newspaper Association
Omaha World Herald
The Post Company
Post-Newsweek Stations, Capital Area, Inc.
Progressive Publishing Company and Clearfield Broadcasters, Inc.
Pulitzer Publishing Company and KSD/KSD-TV, Inc.
Rocky Mountain Broadcasters Association
Summitt Radio Corporation
Telemundo, Inc. et al.
UHF Television Stations
George R. Walker
WJAG, Inc.
WKRG-TV, Inc.
WTMJ

PARTIES FILING REPLY COMMENTS IN RESPONSE TO MEMORANDUM OPINION AND ORDER ANNOUNCING ORAL ARGUMENT

American Newspaper Publishers Association
Buffalo Evening News, Inc. and WBEN, Inc.
Center for Governmental Responsibility
KSL, Incorporated
KUTV, Inc. et al.
The Post Company
Post Newsweek Stations, Capital Area, Inc.

APPENDIX B

Major Studies Submitted in Docket No. 18110 in Response to Further Notice of Proposed Rulemaking

ECONOMIC CONSEQUENCES OF DIVESTITURE

ANPA Comments, Volume II:
(a) Study A—Frazier, Gross Associates, *Valuation of Newspaper Owned TV and Radio Stations.*
(b) Study B—First National City Bank, *Financial and Investment Issues of Forced Divestiture.*

EFFECTS OF COMMON OWNERSHIP ON COMPETITION

J. Rosse, B. Owen, D. Grey, *Economic Issues in Joint Ownership of Newspaper and TV Media* ... ford University Research Center in Economic Growth Memorandum No. 97):
(a) See especially Appendix 1: B. Owen, *Empirical Results on the Price Effects of Joint Ownership in the Mass Media.*
J. Rosse, *Credible and Incredible Economic Evidence* (Reply Comments).
NAB Comments, Exhibit B (Revised): A. Lago and D. Osborne. *A Quantitative Analysis of the Price Effects of Joint Mass Communication Media Ownership.*
NAB Reply Comments:
(a) Appendix C: Addendum to Lago and Osborne (Exhibit B of NAB comments).
(b) Appendix D: Note by NAB Research Staff re: regression analysis of audience effects on price.
Appendix Note to Dr. Harvey Levin's reply comments.

EFFECTS OF COMMON OWNERSHIP ON STATION PERFORMANCE

Students' FCC Study Group, Comments filed by Albert Kramer, May 1971.
H. Levin, *The Policy on Joint Ownership of Newspapers and Television Stations: Some Assumptions, Objectives, Effects.*
H. Levin, Reply Comments.
ANPA Reply Comments, Appendix C: J. Udell, *Critique of Harvey Levin's Comments.*
NAB Reply Comments, Appendix B—on Levin's statement.
The American Institute for Political Communication, Washington, D.C., 1971, *The Effects of Local Media Monopoly on the Mass Mind.*
NAB Comments, Exhibit E: J. Anderson. *The Problem of Information Control: A Content Analysis of Local News Publication.*
Cox Broadcasting Corporation Comments:
(a) Appendix A: W. McDougald and E. Sasser, et al., *Atlanta Market News and Editorial Research Study.*
(b) Appendix B: J. Anderson and D. O. McDaniel, et al., *Two Studies: A Historical Analysis and Content Comparison of Cox Broadcasting Corporation's Affiliated News Media in Dayton, Ohio.*

MULTIPLICITY AND DIVERSITY OF MEDIA

NAB Comments, Exhibit C: C. Sterling, *Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922–1967.*
Study E—Staff Study by ANPA.
Study E—J. Udell, *Economic Consequences of FCC Proposal and Critique of Relevant Literature.*
NAB Comments, Exhibit A: M. Seiden, *Mass Communications in the United States, 1970 and Reply Comments of Stephen R. Barnett.*
ANPA Comments, Volume II, Study C: W. Wilcox, *Newspaper Journalism, Broadcast Journalism and the Community.*
Monopoly in the Media, by Terrall M. deJonckheere.

Further Studies Submitted in Docket No. 18110 in Response to Memorandum Opinion and Order Announcing Oral Argument

ECONOMIC CONSEQUENCES OF DIVESTITURE

No further empirical studies.

EFFECTS OF COMMON OWNERSHIP ON COMPETITION

Comments of Buffalo Evening News and WBEN Exhibit VIII.
Comments of Post-Newsweek Stations.
Supplementary Comments of Professor Harvey Levin.

EFFECTS OF COMMON OWNERSHIP ON STATION PERFORMANCE

Supplementary Comments of Professor Harvey Levin.

MULTIPLICITY AND DIVERSITY OF MEDIA

Comments of Metromedia (Attachments A–D).
Supplemental Comments of the Chronicle Publishing Co. and Chronicle Broadcasting Co.—Volume 1.
Supplement to National Association of Broadcasters Exhibit C Regarding Cross-Ownership of Broadcasting Stations and Newspaper; Supplemental Statement of NAB; Exhibit F Regarding Recent Transfer of Broadcast Stations (Revised).
Comments of Buffalo Evening News and WBEN—Exhibit VII.

APPENDIX C

Staff Study of 1973 Television Station Annual Programing Reports*

SUMMARY

It was found that on the average, co-located newspaper-owned TV stations programed 6% more local news, 9% more local non-entertainment, and 12% more total local including entertainment than do other TV stations. A regression analysis technique was used which holds constant the effects of the following factors: network affiliation, UHF or VHF, group ownership, revenue size, total minutes broadcast during the week and number of commercial stations in market. In each case these differences were statistically significant.

Prepared by: Research and Education Division of the Broadcast Bureau.

STAFF STUDY OF 1973 TV STATION ANNUAL PROGRAMING REPORTS

One of the questions raised in the current cross-ownership inquiry, is whether newspaper owned co-located TV stations program differently than other TV stations, with respect to news, public affairs or other non-entertainment programs, other factors being equal. In order to investigate this question the staff has studied the 1973 Annual Programing Reports, specifically the 18 program categories and day parts shown in Table 1. We find that for the sample composite week reported by the TV stations on their annual report, those stations owned by co-located newspapers broadcast significantly more minutes in several categories of local programing.

Methodology

A reduced form station model of local and public service programing was specified and then regression analysis was used to evaluate the model with each of the eighteen program categories as dependent variables. This method permits one to "hold constant" the other factors in the relationship.

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*None of the previous studies submitted by the parties had these reports yet available to them when they were prepared. Thus, Levin used data taken from *TV Guide* for his studies.

The programing model was specified as:

$$P=b_0+b_1X_1+b_2X_2+b_3X_3+b_4X_4+b_5X_5+b_6X_6+b_7X_7+b_8X_8+e.$$

where P = minutes of program, category broadcast during the 1972–1973 composite week
X_1 = Channel type (VHF or UHF; VHF=1)
X_2 = CBS affiliation (Dummy variable, CBS=1)
X_3 = NBC affiliation (Dummy variable, NBC=1)[1]
X_4 = Newspaper joint ownership in same market (Dummy variable=1 if joint owned)
X_5 = Group ownership (Dummy variable=1 if group owned)
X_6 = Station revenue in thousands of dollars
X_7 = Number of commercial stations in station's market
X_8 = Total minutes broadcast (6 A.M.–Midnight during the composite week)
e = Disturbance factor (assumed normally distributed with mean of zero and variance is σ^2)

In evaluating the model, the object was to test the relationship between X_4 (newspaper joint ownership) and P (minutes of program category) for each of the eighteen program categories.[2] The null hypothesis for each of the eighteen program categories was that the newspaper joint ownership coefficient (b_4) is not significantly different from zero.[3]

Data

Data on the observations included in the study were drawn from a number of sources. Table 2 shows the source of data for each variable in the study.

In general, the analysis included observations from all network affiliates. Independent stations were not included because the number of co-located independent station-newspaper combinations was very small, and their programing patterns were different from affiliated stations. In addition, three other classes of stations were excluded: (1) stations outside the continental U.S., (2) satellite stations, and (3) stations in the top seven markets.[4] The stations in the top seven markets were omitted because previous work by the staff indicated that the stations in these markets behave somewhat differently than stations in other markets and would weigh the results because of their large size. In any case, there were only two newspaper-TV co-located combinations in the top seven markets.

Findings

Table 3 shows the regression results for each of the eighteen programming categories. This table reports the coefficient (b), standard error of the coefficient (S_b) and t statistic for each of the eight independent variables across all eighteen program categories.

Hypothesis tests on the coefficient b_4 indicate that the quantitative effect of newspaper ownership on public service and local programing is not significantly different than zero in all but these three categories:

1. 6 A.M.–Midnight, local sources only, news, public affairs and "other" (ALNPO)
2. 6 A.M.–Midnight, local sources only, news (ALN)
3. 6 A.M.–Midnight, local sources only, all programing, including entertainment (ALNPOE)

Table 3 shows that all three of these coefficients are positive. Thus newspaper joint ownership tends to be associated with increased amounts of program time

[1] The effect of ABC affiliation is captured in the intercept term.
[2] It should be noted that the coefficients associated with the independent variables were not expected to remain constant across all programing categories. For example, the network terms were expected to be larger and more significant for categories that include all program sources than for categories that include local program sources only.
[3] Although the results show other significant relationships, this study was confined to the newspaper ownership factors.
[4] The top seven markets were defined according to 1972 ARB ADI TV households rank; New York, Chicago, Los Angeles, Philadelphia, San Francisco, Boston, and Detroit.

devoted to ALNPO, ALN, and ALNPOE. The amount of increase for each category is:

1. 6 A.M.–Midnight, local sources only, news, public affairs and "other"—55.74 minutes per week (9.0% over the mean of 614.76 minutes)
2. 6 A.M.–Midnight, local sources only, news—21.94 minutes per week (6.3% over the mean of 344.75 minutes)
3. 6 A.M.–Midnight, local sources only, all programing, including entertainment—94.78 minutes per week (12.5% over the mean of 757.10 minutes)

The conclusion is that television stations under joint ownership with a co-located newspaper quantitatively perform at least as well as other stations in the areas covered by this study; however these jointly owned stations broadcast significantly more minutes than other stations in several categories of local programing, other important factors being equal.

TABLE 1—PROGRAM CATEGORIES AND DAY PARTS

6 A.M.–Midnight, All Sources:
1. News, Public Affairs, and "Other".
2. News and Public Affairs.
3. News.
4. Public Affairs.

6 A.M.–Midnight, Local Sources Only:
1. News, Public Affairs, "Other", and Entertainment.
2. News, Public Affairs, and "Other".
3. News and Public Affairs.
4. News.
5. Public Affairs.

Prime Time (6 P.M.–11 P.M.), All Sources:
1. News, Public Affairs, and "Other".
2. News and Public Affairs.
3. News.
4. Public Affairs.

Prime time (6 P.M.–11 P.M.), Local Sources Only:
1. News, Public Affairs, "Other", and Entertainment.
2. News, Public Affairs, and "Other".
3. News and Public Affairs.
4. News.
5. Public Affairs.

TABLE 2—PROGRAM CATEGORIES AND DAY PARTS

6 A.M.–Midnight, All Sources:	
1. News, Public Affairs, and "Other"	ANPO
2. News and Public Affairs	ANP
3. News	AN
4. Public Affairs	AP
6 A.M.–Midnight, Local Sources Only:	
1. News, Public Affairs, "Other", and Entertainment	ALNPOE
2. News, Public Affairs, and "Other"	ALNPO
3. News and Public Affairs	ALNP
4. News	ALN
5. Public Affairs	ALP
Prime Time (6 P.M.–11 P.M.), All Sources:	
1. News, Public Affairs, and "Other"	PNPO
2. News and Public Affairs	PNP
3. News	PN
4. Public Affairs	PP
Prime time (6 P.M.–11 P.M.), Local Sources Only:	
1. News, Public Affairs, "Other", and Entertainment	PLNPOE
2. News, Public Affairs, and "Other"	PLNPO
3. News and Public Affairs	PLNP
4. News	PLN
5. Public Affairs	PLP

NOTE.—Codes in right column are abbreviations used in table 3.

TABLE 3

DEP. VARS. IND. VARS.	ALNPO $\bar{y}$=614.76 R^2=.369	ALNP $\bar{y}$=462.41 R^2=.424	ALN $\bar{y}$=344.75 R^2=.477	ALP $\bar{y}$=117.65 R^2=.130	PLNPO $\bar{y}$=156.63 R^2=.264	PLNP $\bar{y}$=148.98 R^2=.292
Channel type: (VHF=1, dummy variable):						
B	59.78	53.07	54.30	−1.23	9.12	12.61
S	25.32	16.87	10.97	11.27	8.07	7.53
t	*2.36	**3.15	**4.95	−.11	1.13	1.68
CBS:						
B	−25.87	11.32	8.24	3.09	39.34	38.48
S	24.47	16.30	10.60	10.89	7.80	7.27
t	−1.06	.70	.78	.28	**5.05	**5.29
NBC:						
B	5.61	21.79	31.60	−9.80	51.47	46.00
S	23.81	15.86	10.31	10.59	7.59	7.08
t	.24	1.37	**3.06	−.93	**6.79	**6.50
Newspaper joint ownership:						
B	55.74	14.60	21.94	−7.34	2.73	4.40
S	25.85	17.22	11.20	11.50	8.24	7.68
t	*2.16	.85	*1.96	−.64	.33	.57
Group ownership:						
B	−23.15	−16.26	−7.54	−8.72	−5.71	−3.23
S	19.87	13.24	8.61	8.84	6.33	5.91
t	−1.17	−1.23	−.88	−.99	−.90	−.55
REY (XOOO) $\bar{X}$=2,359.49:						
B	.04072	.03033	.02342	.01291	.01162	.01187
S	.00490	.00326	.00212	.00218	.00156	.00146
t	**8.31	**11.13	**11.03	**5.92	**7.44	**8.15
Number of commercial stations $\bar{X}$=3.13:						
B	15.29	3.59	1.54	2.05	−1.48	−1.24
S	4.12	2.74	1.78	1.83	1.31	1.22
t	**3.71	1.31	.86	1.11	−1.13	−1.01
Total broadcast minutes:						
B	.15373	.09277	.06631	.02646	.01657	.01468
S	.02614	.01741	.01132	.01163	.00833	.00777
t	**5.88	**5.33	**5.86	*2.28	*1.99	1.89

	PLN $\bar{y}$=127.36 R^2=.267	PLP $\bar{y}$=21.62 R^2=.057	ALNPOE $\bar{y}$=757.10 R^2=.207	PLNPOE $\bar{y}$=196.09 R^2=.138	ANPO $\bar{y}$=1644.04 R^2=.464	ANP $\bar{y}$=995.65 R^2=.532
Channel type: (VHF=1, dummy variable):						
B	13.59	−.97	−30.51	−14.36	99.46	56.29
S	6.73	3.38	43.33	13.63	35.23	21.77
t	*2.02	−.29	−.70	−1.05	**2.82	**2.58
CBS:						
B	33.25	5.22	−65.60	28.62	344.97	227.50
S	6.51	3.26	41.88	13.18	34.05	21.04
t	**5.11	1.60	−1.57	*2.17	**10.13	**10.81
NBC:						
B	39.61	6.38	−21.06	53.67	185.74	241.22
S	6.33	5.17	40.74	12.82	33.13	20.47
t	**6.26	*2.01	−.52	**4.19	**5.61	**11.78
Newspaper joint ownership:						
B	6.33	−1.95	94.78	24.26	35.40	7.10
S	6.87	3.43	44.23	13.92	35.97	22.23
t	.92	−.57	*2.14	1.74	.98	.32
Group ownership:						
B	−3.36	N/S	−59.29	−18.46	−35.74	−16.12
S	5.29	----------	34.01	10.70	27.65	17.09
t	−.64	----------	−1.74	−1.73	−1.29	−.97
REY (XOOO) $\bar{X}$=2,359.49:						
B	.00909	.00279	.04924	.01226	.03341	.03219
S	.00310	.00064	.00839	.00264	.00632	.00421
t	**6.98	**4.34	**5.87	**4.64	**4.90	**7.64
Number of commercial stations $\bar{X}$=3.13:						
B	−.80	−.43	14.29	.66	12.23	2.15
S	1.10	.35	7.05	2.22	5.73	3.54
t	−.73	−.79	*2.03	.30	*2.13	.61
Total broadcast minutes:						
B	.01383	.00087	.23302	.03527	.28940	.17428
S	.00695	.00346	.04473	.01407	.03637	.02247
t	*1.99	.25	**5.21	*2.51	**7.96	**7.75

See footnotes at end of table.

TABLE 3—Continued

DEP. VARS. IND. VARS.	AN $\bar{y}$=670.46 R^2=.645	AP $\bar{y}$=325.19 R^2=.150	PNPO $\bar{y}$=413.34 R^2=.279	PNP $\bar{y}$=381.04 R^2=.360	PN $\bar{y}$=264.34 R^2=	PP $\bar{y}$=116.70 R^2=
Channel type: (VHF=1, dummy variable):						
B	61.61	−5.41	6.74	5.07	6.72	−1.65
S	14.55	14.52	11.82	10.27	8.34	6.04
t	**4.24	−.37	.57	.49	.81	−.27
CBS:						
B	225.29	2.21	82.63	82.04	70.80	11.24
S	14.06	14.04	11.43	9.92	8.06	5.83
t	**16.02	.16	**7.23	**8.27	**8.78	1.93
NBC:						
B	250.73	−18.51	−38.73	−46.78	67.01	−113.80
S	13.68	13.36	11.12	9.66	7.85	5.68
t	**18.99	−1.36	**−3.48	**−4.85	**8.54	**−20.25
Newspaper joint ownership:						
B	23.25	−16.15	6.16	12.78	5.63	7.15
S	14.85	14.82	12.07	10.48	8.52	6.16
t	1.57	−1.09	.51	1.22	.66	1.16
Group ownership:						
B	−13.27	−3.35	−8.19	−2.78	−1.14	−1.64
S	11.41	11.40	9.28	8.06	6.55	4.74
t	−1.62	−.29	−.88	−.35	−.18	−.35
REY (XOOO) $\bar{X}$=2,359.49:						
B	.01451	.01768	.01408	.01229	.00849	.00380
S	.00282	.00281	.00229	.00199	.00161	.00117
t	**5.15	**6.29	**6.15	**6.18	**5.26	**3.25
Number of commercial stations $\bar{X}$=3.13:						
B	2.54	−.39	−2.45	−2.27	−.16	−2.11
S	2.37	2.36	1.92	1.67	1.36	.98
t	1.07	−.17	−1.28	−1.36	−.12	**−2.15
Total broadcast minutes:						
B	.12758	.04670	−.02119	.00641	.01362	−.00721
S	.01502	.01499	.01221	.01060	.00861	.00623
t	**8.50	**3.12	−1.74	.61	1.58	−1.16

**Significant at the 1 percent level.
*Significant at the 5 percent level.
N/S not significant (the explanatory power of this variable was so low that the computer did not include it in the analysis).

See table 2 for key to abbreviations.

APPENDIX D

TV Station Monopolies—Divestiture Required

City, State:	*TV Call Letters*
Alabama: Anniston	WHMA
Georgia: Albany	WALB
Iowa: Mason City	KGLO
Mississippi: Meridian [1]	WTOK
New York: Watertown	WWNY
Texas: Texarkana	KTAL
West Virginia: Bluefield	WHIS

[1] WHTV, a satellite of Tupelo station WTWV, provides city-grade coverage but has no studio in Meridian.

APPENDIX E

AM and FM Station Monopolies—Divestiture Required

City, State	AM call letters	FM call letters
Arkansas: Hope	KXAR	
Illinois:		
Effingham	WCRA	WCRA-FM
Macomb	WKAI	WKAI-FM
Kansas: Arkansas City	KSOK	
Michigan: Owosso	WOAP	WOAP-FM
Nebraska: Norfolk	WJAG	WJAG-FM
Ohio: Findlay	WFIN	WFIN-FM
Pennsylvania: DuBois	WCED	WCED-FM
Wisconsin: Janesville	WCLO	WJVL

APPENDIX F

1. Section 73.35 of the Commission's Rules and Regulations is amended to read as follows:

§ 73.35 MULTIPLE OWNERSHIP.

(a) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mV/m groundwave contours of the existing and proposed stations, computed in accordance with § 73.183 or § 73.186; or one or more television broadcast stations and the grant of such license will result in the predicted or measured 2 mV/m groundwave contour of the proposed station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted or measured 2 mV/m contour, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published.

(b) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven standard broadcast stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980 to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations which place(s) a city-grade signal over the community during daytime hours. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

NOTE 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2.—In applying the provisions of paragraphs (a) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

NOTE 3.—Except as provided in Note 4 of this section, in applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 4.—In applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 U.S.C. section 80a–3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated.

NOTE 5.—In calculating the percentage of ownership of voting stock under the provisions of Note 4, if an investment company directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper as it owns of the outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company need not be considered under the 3-percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

NOTE 6.—In applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts need be considered only if such bank directly or indirectly owns 5 percent or more of the outstanding voting stock: *Provided*, The bank files a disclaimer of intent to control the management or policies of the broadcast or newspaper corporation. Holdings by banks shall be aggregated if the bank has any right to determine how the stock will be voted.

NOTE 7.—In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

NOTE 8.—Paragraph (a) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for increased power for Class IV stations; to applications for assignment of license or transfer of control filed in accordance with § 1.540(b) or § 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled standard broadcast stations and if no new encompassment of communities proscribed in paragraph (a) of this section as to commonly owned, operated, or controlled standard broadcast stations and television broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of standard broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of standard broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a) of this section will not apply to any application by a party who directly or indirectly owns, operates or controls a UHF television broadcast station where grant of such application would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled standard broadcast station or would result in the entire community of license of such UHF station being encompassed by the 2 mV/m contour of such standard broadcast station. Such community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled standard

broadcast station and daily newspaper fall within the encompassing proscription of paragraph (a) of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 9.—Paragraph (a) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade A contour of which completely encompasses the community of license of a commonly owned, operated, or controlled standard broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such standard broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled standard and "non-satellite" television stations may not be transferred or assigned to a single person, group, or entity except as provided in Note 8.

NOTE 10.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

2. Section 73.240 of the Commission's Rules and Regulations is amended to read as follows:

§ 73.240 MULTIPLE OWNERSHIP.

(a) (1) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 mV/m contours of the existing and proposed stations, computed in accordance with § 73.313; or one or more television broadcast stations and the grant of such license will result in the predicted 1 mV/m contour of the proposed station, computed in accordance with § 73.313, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted 1 mV/m contour, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published.

(2) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other FM broadcast station if the grant of such license would result in a concentration of control of FM broadcasting in a manner inconsistent with the public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven FM broadcast stations.

(b) Paragraphs (a) and (c) of this section are not applicable to non-commercial educational FM stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations which place(s) a city-grade signal over

the community during daytime hours. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

NOTE 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2.—In applying the provisions of paragraphs (a)(1) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

NOTE 3.—Except as provided in Note 4 of this section, in applying the provisions of paragraph (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 4.—In applying the provisions of paragraphs (a)(1) and (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 U.S.C. section 80a–3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated.

NOTE 5.—In calculating the percentage of ownership of voting stock under the provisions of Note 4, if an investment company directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper, as it owns of the outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company need not be considered under the 3-percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

NOTE 6.—In applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts need be considered only if such bank directly or indirectly owns 5 percent or more of the outstanding voting stock: *Provided*, The bank files a disclaimer of intent to control the management or policies of the broadcast or newspaper corporation. Holdings by banks shall be aggregated if the bank has any right to determine how the stock will be voted.

NOTE 7.—In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

NOTE 8.—Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with § 1.540(b) or § 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled FM broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled FM broadcast stations and television broadcast stations or daily newspapers would result. Said paragraph will

apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of FM broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of FM broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a)(1) of this section will not apply to any application by a party who directly or indirectly owns, operates or controls a UHF television broadcast station where grant of such application would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled FM broadcast station or would result in the entire community of license of such UHF station being encompassed by the 1 mV/m contour of such FM broadcast station. Such community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled FM broadcast station and daily newspaper fall within the encompassing proscription of subparagraph (a)(1) of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 9.—Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade A contour of which completely encompasses the community of license of a commonly owned, operated or controlled FM broadcast station, or the community of license which is completely encompassed by the 1 mV/m contour of such a FM broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled FM and "non-satellite" television stations may not be transferred or assigned to a single person, group, or entity except as provided in Note 8.

NOTE 10.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

3. Section 73.636 of the Commission's Rules and Regulations is amended to read as follows:

§ 73.636 MULTIPLE OWNERSHIP

(a)(1) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684; or one or more standard broadcast stations and the grant of such license will result in the Grade A contour of the proposed station, computed in accordance with § 73.684, encompassing the entire community of license of one of the standard broadcast stations, or will result in the predicted or measured 2 mV/m ground-wave contour(s) of the standard broadcast station(s), computed in accordance with § 73.188, or § 73.186, encompassing the entire community of license of the proposed station, or one or more FM broadcast stations and the grant of such license will result in the Grade A contour of the proposed station,

computed in accordance with § 73.684, encompassing the entire community of license of one of the FM broadcast stations, or will result in the predicted 1 mV/m contour(s) of the FM broadcast station(s), computed in accordance with § 73.313, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the Grade A contour, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band.

(b) Paragraphs (a) and (c) of this section are not applicable to noncommercial educational television stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial television station which places a city-grade signal over the community. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980.

NOTE 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2.—In applying the provisions of paragraphs (a)(1) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

NOTE 3.—Except as provided in Note 4 of this section, in applying the provisions of paragraphs (a)(1), (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 4.—In applying the provisions of paragraphs (a)(1), (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 U.S.C. section 80a-3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated.

NOTE 5.—In calculating the percentage of ownership of voting stock under the provisions of Note 4, if an investment company directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper as it owns of the outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company need not be considered under the 3-percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

NOTE 6.—In applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts need be considered only if such bank directly or indirectly owns 5 percent or more of the outstanding voting stock: *Provided*, The bank files a disclaimer of intent to control the management or policies of the broadcast or newspaper corporation. Holdings by banks shall be aggregated if the bank has any right to determine how the stock will be voted.

NOTE 7.—In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stock holders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street name for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

NOTE 8.—Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with § 1.540(b) or § 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled television broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled television broadcast stations and standard or FM broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of television broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of television broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a)(1) of this section will not apply to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in Grade B overlap with another television broadcast station that was commonly owned, operated, or controlled as of September 30, 1964; or to any application concerning a UHF television broadcast station which would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled standard or FM broadcast station or which would result in the entire community of license of such UHF station being encompassed by the 2 mV/m or 1 mV/m contours of such standard or FM broadcast stations, respectively. Such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled television broadcast station and daily newspaper fall within the encompassing proscription of subparagraph (a)(1) of this section, the station may not be assigned to a single person, group, or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 9.—Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade B

contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated or controlled daily newspaper or the community of license of a commonly owned, operated or controlled standard or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such a standard broadcast station or the 1 mV/m contour of such an FM station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled "non-satellite" television stations with Grade B overlap or such commonly owned operated or controlled non-satellite television stations and standard or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 8. Nor shall any application for assignment or transfer concerning such non-satellite stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated or controlled newspaper is proposed to be transferred, except as provided in Note 8.

NOTE 10.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

APPENDIX G

SUMMARY OF ACTIONS TAKEN

I. PREVIOUS RULES CONTINUED IN EFFECT

(a) *TV-radio combinations.* No divestiture of existing combinations is required. The present rules governing such combinations which were adopted in an earlier phase of this proceeding remain in effect. This means that a licensee of a VHF television station may not build or acquire a radio station(s) (AM, FM, or AM–FM) in the same market; and that the licensee of an AM station, an FM station, or an AM–FM combination may not build or acquire a VHF station in the same market. Although existing combinations are not required to divest, if the owner of a VHF-radio combination sells, he must sell the TV and the radio station(s) to different parties. Applications involving UHF TV stations and radio stations are handled on a case-by-case basis. VHF television stations and AM stations are considered to be in the same market if the Grade A contour of the TV station completely encompasses the community of license of the AM station, or if the 2 mV/m contour of the AM station completely encompasses the community of license of the TV station. A similar market concept holds for FM stations and TV stations except that the critical contour for the FM station is 1 mV/m.

(b) *AM–FM combinations.* Existing rules governing such combinations continue in effect. No divestiture is required. This means that the licensee of an AM station may build or acquire an FM station in the same market and vice versa. Moreover, such a combination may be sold to a single party. The matter of whether the present rules governing duplication of programming by AM–FM combinations should be amended will be pursued in pending Docket No. 20016 (39 Fed. Reg. 14228 (1974)).

II. NEW RULES ADOPTED

(a) *Radio-newspaper combinations.* Divestiture is required by January 1, 1980, if the only daily newspaper of general circulation published in a community and the only radio station(s) placing a city-grade signal over the entire community in daytime hours are under common ownership. The owner of such a newspaper-AM–FM combination may satisfy the divestiture requirement by selling the newspaper, the AM–FM, the AM, or the FM. Waivers will be granted on a proper showing. The formation of new radio-newspaper combinations in the same market is barred. They are considered to be in the same market if the 2 mV/m

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contour of an AM station or the 1 mV/m contour of an FM station completely encompasses the community in which the newspaper is published. If an existing radio station licensee acquires a daily newspaper in the same market, he is given until the date of expiration of license of the radio station, or one year, whichever is longer, in which to divest of one of the two properties. Newspaper-radio combinations which are in the same market but which do not fall within the divestiture requirement previously mentioned need not divest. However, if such combinations are sold the newspaper and the radio station(s) must be sold to different parties.

(b) *TV-newspaper combinations.* Divestiture is required by January 1, 1980, if the only daily newspaper of general circulation published in a community and the only TV station placing a city-grade signal over the entire community are under common ownership. The divestiture requirement may be satisfied by selling either the newspaper or the TV station. The divestiture requirement applies whether the TV station is UHF or VHF. Waivers will be granted on a proper showing. The formation of new TV-newspaper combinations in the same market is barred. (The proscription against formation of new TV-newspaper combinations applies whether the TV station is UHF or VHF.) They are considered to be in the same market if the Grade A contour of the TV station completely encompasses the community in which the newspaper is published. If an existing TV licensee acquires a daily newspaper in the same market, he is given until the date of expiration of the TV license, or one year, whichever is longer, in which to divest. Newspaper-TV combinations which are in the same market but which do not fall within the divestiture requirement previously mentioned need not divest. However, if such combinations are sold the newspaper and the TV station must be sold to different parties.

III. POLICY AS TO CROSS-INTERESTS IN NEWSPAPER-BROADCAST COMBINATIONS

The policy heretofore applied to cross-interests in broadcast stations serving substantially the same area will be applied to newspaper-broadcast combinations falling within the ambit of the newly adopted rules.

Concurring Statement of Commissioner Robert E. Lee

I have previously articulated my views with respect to cross-ownership of newspaper and TV—a breakdown of these combinations would, in my opinion, result in the demise of many newspapers throughout the United States. I recall with sadness the death of the *Boston Herald* newspaper after the Commission divested its wholly owned subsidiary, TV station WHDH.

However, I am concurring in the Commission's decision today because the rules are primarily prospective in nature and because, based on my prior experience, the Commission should give little weight to this issue in a comparative hearing against an existing TV licensee. As the Commission stated (at paragraph 129) any overall restructuring of the industry it deemed necessary has been done in this docket. To permit restructuring at renewal time would permit to be done indirectly what the Commission has refused to do directly. In addition, I will have the opportunity to analyze and evaluate future waiver requests of the Commission's rules on a case-by-case basis.

Now, with respect to AM/FM combinations, I believe it is economically premature to break them up at this point in time. Over these many years, the Commission has encouraged these combinations in order to support and promote FM development. The day may well come when AM and FM licensees can economically survive as separate entities. At that point, I, of course, will review my present position.

Concurring Statement of Commissioner Charlotte T. Reid

(Re Docket 18110)

Today the Commission makes a far reaching decision in its Telecommunications Policy. A decision requiring divestiture of cross-owned newspaper-television and radio stations. I have reluctantly concurred with the majority's decision to require divestiture of sixteen (16) such combinations by January 1, 1980, because of what I feel to have been a long history of service by many of these newspaper/broadcast combinations. Many of these could not have existed except for cross-ownership and I find it somewhat difficult to require such drastic action. However, it does appear that these sixteen (16) are exceptional cases and therefore distinguishable from other situations. Additionally, the affected parties still have the opportunity to seek waivers of our divestiture requirement.

I am certain that this will not be the last that we hear of this issue, either before the Commission or in the Courts.

Statement of Commissioner Benjamin L. Hooks Concurring in Part; Dissenting in Part

(In Re Multiple Ownership of Broadcast Stations—Docket 18110)

The litigious history of the issue of newspaper/broadcast cross-ownership outlined in the first twenty-three paragraphs of the majority opinion, the mamouth record amassed in this Docket, and the Commission's continuing antipathy toward media concentrations as well as its espoused penchant for diversification bear tangible witness to the complexity of this matter.

My own considerations have been fraught with attempts to apply generally accepted wisdoms to the problem. In so doing, I have been frustrated because, when applied to the question of newspaper/broadcast cross-ownership, many of these "wisdoms" conflict and appear to dictate opposite results.

For example, the maxim that "two heads are better than one" can be applied to the Supreme Court's logic in attempting to achieve "the widest possible dissemination of information from diverse and antagonistic sources". *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). Equally. I accord with the Commission's policy of promoting diversification of mass communications as "a factor of primary significance since . . . it constitutes a primary objective in the licensing scheme." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). We should, I believe, continually endeavor to encourage a proliferation of information and entertainment sources as necessary for the enrichment and enlightment of a pluralistic society with broadly diffuse interests. On the cross-ownership question in particular, there is the vigorous contention of Professor Stephen Barnett of the University of California, Berkeley, Law School that "there is a considerable amount of concrete evidence of harm from crossownership— consisting mainly of examples found in a variety of published,

reliable sources—which in its aggregate demonstrates not only substantial and widespread harm but a clear tendency to produce it." [1] Professor Barnett's position is supported, in the main, by many other parties to this proceeding including the Department of Justice.

Conversely, as I contemplate the superior performance of many newspaper-owned stations (*see*, Dissenting Statement of Commissioner Nicholas Johnson, "Broadcasting in America: The Performance of Network Affiliates in the Top 50 Markets", 42 FCC 2d 3 (1973) [2]) and speculate on the performance of some unknown successor, my conditioned response yields "a bird in the hand is worth two in the bush" philosophy. Opponents ask: Why require divestiture for its own sake of a superior broadcaster, with experience, background and resources, for an unknown licensee whose operation may be inferior? Can we afford, through wide-scale divestiture, to experiment with a dogmatic diversity formula; and, after the churning has ceased, who will profit—the new owners or the public? The *Rand studies*, note 1, *supra*, suggest that newspaper ownership of stations has no effect, good or bad, whatsoever.

In the clash of these opposing pressures, I have sought the views of the judiciary which has weighed these elements before. The clearest and most fundamental precept which the Commission must heed is ". . . there is nothing in the Act [Communications Act of 1934, as amended. 47 U.S.C. 151, et seq.] which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a broadcast license." *Stahlman* v. *FCC*, 75 U.S. App. D.C. 176, 126 F. 2d, 124, 127 (1949). *Stahlman*, citing *Tri-State Broadcasting Co.* v. *FCC*, 68 U.S. App. D.C. 292, 96 F. 2d 564 (1938) went on about the Act to say: "It does not embrace and should not be extended by implication to embrace a ban on newspapers as such, for if that is the case, it would follow that the power to exclude exists as to schools and churches; . . . Hence, it is that in the present state of the law that a newspaper owner who is also the owner of a broadcast station may very well say to whomever challenges this dual right: 'Who are thou that judgest another man's servant. To his own master he standeth or falleth.'" 75 U.S. App. D.C. at 179–80, 126 F. 2d at 127–28. Overwhelmingly, the attitude of the courts towards bare cross-ownership has been *nehil nequam est praesumendum* (nothing wicked is to be presumed) [3]. But,

[1] S. R. Barnett, "Cross-Ownership of Mass Media in the Same City. A Report to the John and Mary R. Markle Foundation. *A Critique of, and Supplement to, the Prospective Reports of the Rand Corporation*" (September 23, 1974), at preface. In his report, Professor Barnett takes exception to two Rand Corporation studies (W. S. Baer, H. Geller, J. Grundfest & K. B. Posner, "Concentration of Mass Media Ownership: Assessing the State of Current Knowledge" [R–1584–NSF]. September, 1974 and W. S. Baer, H. Geller & J. A. Grundfest, "Newspaper-Television Cross Ownership; Options for Federal Action", August, 1974) which tend to conclude that there is a "lack of concrete evidence of harm from cross-ownership." The *Rand studies*, it seems, have determined that "the evidence on the effects of cross-media ownership supports neither allegations of substantial harm nor those of public benefits from newspaper-television combinations." *Barnett Study*, at preface.

[2] Although a harsh critic of "media barons," former Commissioner Nicholas Johnson, in his overall performance ranking (i.e., news, commentary, public service announcements, employment of minorities and women) of TV stations in the top fifty markets, rated newspaper owner licensees quite respectably compared to other individual and group stations. *See* Table 17 of *Johnson's Study*, 42 FCC 2d at 77 *et seq.*

[3] *See, also, Massachusetts Bay Telecasters, Inc.* v. *FCC*, 104 U.S. App. D.C. 226, 261 F. 2d 55 (1958); *Pinellas Broadcasting Co.* v. *FCC*, 97 U.S. App. D.C., 236, 230 F. 2d 204, *cert. denied*, 350 U.S. 1007 (1956); *McClatchy Broadcasting Co.* v. *FCC*, 99 U.S. App. D.C., 195, 239 F. 2d 15, *cert. denied sub nom., Sacramento Telecasters, Inc.* v. *McClatchy Broadcasting Co.*, 353 U.S. 918 (1957). *But cf., Lorain Journal Co.* v. *U.S.*, 342 U.S. 143 (1951).

where cross-ownership is not "bare", where it is accompanied by other conditions such as a monopoly, cross-ownership can be a menace and affirmative action by the Commission is proper. *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959). The Commission has here required monopolies to divest and I agree with its decision in this respect. Where situations are extreme, we can and have acted (*see, e.g., Frontier Broadcasting Co.*, 21 FCC 2d 570 (1970)); and, should always do so where the circumstances present a spectre of specific abuse as in the *Mansfield Journal* case [4] or the great likelihood thereof. *See, Chronicle Broadcasting Co.*, 16 FCC 2d 882, 17 FCC 2d 245, *reconsideration denied*, 29 FCC 2d 903 (1969)).

Consequently, I am in favor of divestiture as a means of attaining necessary diversification because, as I have indicated, my philosophy favors the heterogeneity of voices that diversity should bring. That is the uniqueness and strength of this country. In my mind, then, the question is not one of divestiture, *per se*, but how that divestiture is accomplished and what conditions other than monopoly warrant *immediate* divestiture. Balancing inputs, I must concur with the majority's decision to the extent that it emphasizes a prospective means of attaining diversification rather than the harsh and unpredictable solution of divestments of an unprecedented scale. This Commission processed last calendar year 1,129 assignment and transfer applications out of some 8,600 existing stations in this country. Patently, there is flux and change in media ownership and the attritional process, governed by our future prohibitions, can provide a great deal of the desired diversification in a more orderly and equitable fashion than a wholesale upheaval. Nothing I have observed in this record or heard at oral argument warrants indiscriminate action. To mandate immediate divestiture in the less extreme situations, under the presently depressed economic conditions, would create undue hardships. I cannot find that justified when the same end may be accomplished, without the harsh and drastic dislocation, by our prospective policy.

Nevertheless, I cannot join my colleagues in limiting divestiture to pure monopoly instances while ignoring other situations where the problem could be as bad or worse. In confining divestiture to the thrust of dictum in the Supreme Court in *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959) (speaking on the point of absolute media monopolies), we have not paid proper heed to *Plains Radio Broadcasting Co.* v. *FCC*, 85 U.S. App. D.C. 48, 52, 175 F. 2d 359, 363 (1949) where the court held:

> It seems to us that in considering the public interest in the maintenance of competition in the dissemination of news, the Commission cannot select the fact that one applicant is the owner of the town's only newspaper and ignore the fact that the other applicant is directly related to several newspapers and radio stations in the same general section of the country (although not in the immediate community). *A concentration by a chain of stations over an area* would seem to us to be a factor in a comparative evaluation from the standpoint of competition in news dissemination. (Emphasis added).

[4] *Mansfield Journal Co.* v. *FCC*, 18 F. 2d 28 (D.C. Cir. 1950) (refusing to grant Construction Permit for AM–FM because of competitive abuse).

As some of my past dissents have stressed [5], the regional concentration problem begs for further scrutiny by this agency. Informational sway over entire geographic regions, though not unadulterated monopolies, can have a much more adverse impact than a purely local exclusivity as the *Plains Radio* case notes. I wish, therefore, we had examined those situations more extensively in this Docket which is styled "multiple ownership of broadcast stations."

My principal dissent flows from our failure to use this proceeding in any way at all to deal with the question of minority ownership. The courts have told us, in *Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F. 2d 1201 (1971) and more recently in *TV 9, Inc.*, v. *FCC*, —— U.S. App. D.C., ——, 495 F. 2d 929 (1973), *cert. denied*, —— U.S. ——, 95 S. Ct. 245 (1974), that the Commission must take steps to integrate minorities into broadcast ownership. While I am not naive enough to believe that even categorical divestiture, where swaps and stock transfers were the most likely result, would dramatically increase minority ownership, there are illustrations of locations where compulsory divestiture could have led to minority ownership. As stated at the July 24, 1974 Oral Argument by Kujaatele Kweli (National Black Media Coalition): "Guidelines must be developed which not only require divestiture, but which also increase diversity; otherwise new rules might only reorganize vested interests. Any new ruling must be conceived in the spirit of creating new opportunities for the previously deprived." Tr. at 153. Mr. Kweli recognizes, as do I, that naked divestiture of cross-owned stations, *simpliciter*, is unlikely to improve the minority position in broadcasting. In that connection, I believe the law allows us to facilitate such minority acquisitions in cases where divestiture is required by tailoring the qualifications for assignees of divested stations to stress minority ownership. Just as we now have minimum requirements for all licensees (*i.e.*, legal, technical qualifications, financial and character qualifications), we could add a substantial minority ownership qualification without contravening Section 310 of the Communications Act. Section 310 merely prohibits us from considering the "disposal of the permit or license to a person other than [that] proposed" by the licensee. 47 U.S.C. § 310(b). It does not bar us from adopting general qualifications for all assignees or transferees; only from considering other parties not selected by the licensee who *first* meet our specified criteria. A more complete discussion of this concept is stated in a pleading in this Docket filed by Citizens Communications Center on behalf of the National Black Media Coalition (*Letter to Chairman Richard Wiley*, September 9, 1974). While I do not here subscribe to all of the proposals set forth therein, I believe the Commission should have devoted more attention to the proposal and dissent from its neglect to, at least, offer a meaningful alternative to accomplish some minority ownership of the divested properties.

Finally, I am not in concert with the majority insofar as our document does not specify the separation of operations between those

[5] *E.g., In Re: WEMJ, Laconia, New Hampshire.* (FCC Report No. 12757, No. 14, 1974).

newspaper/broadcasters untouched by our policy announced herein. I associate myself, therefore, with the views of Commissioner Quello on this point set forth in his concurring statement. More specifically, I am in favor of the program proferred by Marcus Cohn, Esq., embodied in a letter of July 26, 1974, to the Broadcast Bureau which specifies as follows:

(1) Separate sales staffs; competitive solicitation of all advertisers; (2) No combination or interrelationship of advertising rates; (3) Separate editorial and reportorial staffs; (4) No discriminatory policies or advertising rates to media competitiors; (5) Cross-ownership licensing not be permitted, unless their related newspaper—(a) carries fair program listing of TV stations; (b) accepts, on a nondiscriminating basis, advertising from all broadcasting stations; and (c) licensee and newspaper has not discriminatory policy against advertisers who use competitive media.

Inasmuch as we are not mandating divestiture of all co-located media, and in view of the abuses alleged by Professor Barnett, the National Black Media Coalition, and others, we should have taken the course recommended by Mr. Cohn to assure that the asserted wrongdoing does not recur.

Statement of Commissioner James H. Quello

(Docket No. 18110)

While I am in substantial agreement with the philosophy as well as the result of this Second Report and Order, and have voted to support it, I question whether it goes far enough in one important respect. The operational separation of commonly owned newspaper-television and newspaper-radio combinations is, in my opinion, a vital element in assuring the Commission's long-held policy of diversity of voices and equitable business competition without forcing the harsh remedy of requiring general divestiture. The Commission's views on this issue are expressed in paragraph 132 of this document and I subscribe to the language in that paragraph. However, I firmly believe that this view should be expressed as Commission policy, at the very least, and as a rule if First Amendment considerations permit it.

My own view is that, absent affirmative effort to assure operational separation on the part of "combination" licensees, the Commission must exercise extreme vigilance on a case-by-case basis and, should there be evidence of widespread abuse, re-visit this entire matter.

Concurring Statement of Commissioner Abbott Washburn

(On Newspaper-Broadcasting Cross-Ownership Decision—January 28, 1975)

I have serious reservations about one facet of the decision in this proceeding, namely, the divestiture requirement involving newspaper-radio combinations in nine small markets. In my judgment none of these situations amounts to an undue concentration of local "opinion power" akin to the newspaper-television monopoly cross-ownerships. But my chief concern stems from the possible economic disruption which our action may inflict on the small communities involved, par-

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ticularly on those seven with populations under 20,000. I hope, therefore, that our waiver policy in these situations will take careful note of the possible harm to a community that could result from the forcing of a small daily newspaper out of business, or from the forcing of a small daily newspaper to become a weekly newspaper, and from the breaking up of an AM–FM radio combination where the FM is dependent upon the AM financially and/or provides the only local nighttime service. In my view we ought, also, to give special consideration where the Commission's allocation rules prohibit another local radio station from coming into existence in these communities.

STATEMENT OF COMMISSIONER CLEN O. ROBINSON CONCURRING IN PART AND DISSENTING IN PART

The FCC does have a responsibility to promote diversification of ownership and competition among communications media, as the Commission recognizes by today's Report and Order. My colleagues and I part company not over whether that responsibility exists, but over its scope and its implementation. As a matter of practical effect the Commission's decision is essentially limited to a few cases of literal monoply, inasmuch as those are the only cases in which it is willing to require divestiture. Although future cross ownerships are banned in all markets, I believe a prospective ban is of little significance.

My version of what best serves the public interest would forbid, and require the divestiture of, commonly owned media (either newspaper or station could, of course, be divested) in all heavily concentrated markets, which are not confined to those in which the co-owned media constitute a literal monopoly. I would apply the same standard of undue concentration for divestiture as for a ban. For both I would apply essentially the standards developed in antitrust law—which, *conservatively interpreted*, would require divestiture in cases where the station and newspaper together controlled at least 30 percent of their respective markets. I would acknowledge the possibility of waivers in extraordinary cases, but I would emphasize that such waivers would be granted only on a most compelling showing of special considerations. With respect to radio-newspaper ownerships, I am less concerned about the dangers of concentration, but I would adopt the same standard of concentration as in the case of television-newspaper cross ownerships. I would deal in the same way with aural-television station combinations, which are at least still nominally before us in this proceeding.[1] Because my pre-eminent concern is with the newspaper-television cross ownerships and because the same basic policy considerations are, I believe, generally applicable to the other combinations, I shall focus principally on the newspaper-television combinations.

[1] The 1970 rules did not, of course, require divestiture of aural-television combinations but our Further Notice of Proposed Rule Making; 22 F.C.C. 2d 339 (1970) did leave open the possibility of ordering divestiture. It should be noted that AM–FM combinations are also, nominally, before us even though the original ban on such combinations was modified. See *Multiple Ownership Rule*, 22 FCC 2d 309 (1970). In its 1974 Memorandum Opinion and Order setting oral argument in Docket 20018, 39 Fed. Reg. 9551 (March 12, 1974) the Commission indicated, however, that it would consider, as an alternative to an AM–FM ownership ban, tightening our AM–FM nonduplication rules. For the present time I am content with that alternative, without prejudice to the possibility of revisiting this issue at an appropriate time in the future.

I. COMPETITION AS A COMMUNICATIONS POLICY

The majority ably expounds the general policy ground for our concern. While I concur in their general exposition I wish to add a few observations of my own.

It is not up to the FCC, of course, to enforce the antitrust laws as such: our mandate is the broader one of enforcing the public interest, convenience and necessity. *United States v. RCA*, 358 U.S. 334 (1959). Clearly, public interest, convenience and necessity includes concerns other than diversification.[2] Just as clearly, as the majority here states, diversity and related competitive concerns bear heavily on the public interest and must be considered in connection with its ascertainment.[3] Such matters in a particular situation may even prove dispositive. *United States v. RCA*, 358 U.S. at 351–52. Our own decisions have reiterated these same principles. In fact, I had supposed this statement of principle too well established to require further statement here, but in light of arguments by the NAB and ANPA (among others) to the contrary, apparently that assumption was incorrect. Their arguments are several.

A. The "No Competition for Competition's Sake" Argument

Relying on *Hawaiian Telephone Co. v. FCC*, 498 F. 2d 771 (D.C. Cir. 1974), and *FCC v. RCA Communications Inc.*, 346 U.S. 86 (1953), both ANPA and NAB have argued that "competition for the sake of competition" is indefensible; and that, before we go about promoting competition, we must affirmatively find that the public interest will be served thereby. Reliance on both decisions is misplaced inasmuch as both dealt with common carrier regulation of so-called "natural monopolies." Where natural monopoly is concerned, the received wisdom has been that competition has a limited role and that there is therefore no general presumption in its favor.[4] However, in the broadcast field that is not the received wisdom. More important, it is not the law. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 105–110 (1973); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

I acknowledge that if our deconcentration policy were premised solely on promoting competition in commercial advertising in local markets, we would have to give more studied thought to the argument raised by the NAB and ANPA. While I recognize that competition in advertising markets is an entirely proper aim of public policy, I also acknowledge that in radio and television advertising markets, competition is not an unalloyed benefit. A short digression into the economic

[2] *Cf., Carroll Broadcasting Co. v. FCC*, 258 F. 2d 440 (D.C. Cir. 1958) (competitive entry in broadcasting); *FCC v. RCA Communications Inc.*, 346 U.S. 86 (1953) (competitive entry of common carrier).

[3] *E.G., Joseph v. FCC*, 404 F. 2d 207 (D.C. Cir. 1968); *Clarksburg Publishing Co. v. FCC*, 225 F. 2d 511 (D.C. Cir. 1955); *Mansfield Journal Co. v. FCC*, 180 F. 2d 28 (D.C. Cir. 1950); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *NBC v. United States*, 319 U.S. 190, 222–24 (1942).

[4] This wisdom is not received by everyone; see, *e.g.*, Posner, *Natural Monopoly and Its Regulation*, 21 Stanf. L. Rev. 548 (1969); Demsetz, *Why Regulate Utilities*, 11 J. of Law & Econ. 55 (1963). The FCC too has in recent years rejected some of the conventional wisdom about the supposed incompatibility of competition and common carrier regulation, and has come increasingly to recognize the important role of competition even in closely regulated areas traditionally regarded as the sole province of natural monopolies. See, *e.g.*, *Specialized Common Carrier Services*, 29 FCC 2d 870 (1971); aff'd. —— F. 2d —— (9th Cir., Jan. 20, 1975); *Domestic Communications-Satellite Facilities*, 35 FCC 2d 844 (1972).

effects of concentration (or, conversely, competition) will illustrate the nature of the problem.

The standard economic rationale for market deconcentration derives from the hypothesis that concentrated markets provide the opportunity for sellers to restrict output and to raise the price of their goods or services.[5] As a result, resources migrate from these markets to other markets in which they contribute less to the common good. In short, concentration distorts efficient resource allocation. See, generally, F. Scherer, *Industrial Market Structure and Economic Performance*, *ch.* 17 (1970). Application of this theory to television advertising would lead one to expect a similar effect on local-market concentration upon advertising rates, and correspondingly on "proper" resource allocation. Though no conclusive result emerges from the comments filed in this proceeding,[6] we can assume for the sake of argument that there is a direct relationship between concentration, appropriately defined, and advertising rates.

The standard economic argument that attempts to connect competition and economic welfare through the price mechanism may not be sufficient to allow us to make policy judgments concerning television advertising.[7] If concentration in local advertising markets conveys monopoly power, this power would be reflected in the broadcaster's ability to restrict viewer hours of advertising messages in order to raise the price per viewer exposure. This effect could be accomplished either through a decision to offer fewer commercial interruptions in entertainment programming or to air programs with less mass appeal. The former reduction we might applaud. The latter we might deplore—unless it reflected the substitution of "public service" programming for more-popular syndicated or network fare. The broadcaster with monopoly power is surely freer—and might well be more inclined—to preempt a network motion picture in order to offer a detailed investigation of a local sewer scandal. Thus, market power may be consistent with our desire to stimulate the public-service responsibility of broadcasters. Indeed, if there were not *some* barriers to competition in local markets, I suppose we could not expect licensees to offer the nonremunerative programs which are part of their public service responsibility. See *Carroll Broadcasting Co. v. FCC*, 258 F. 2d 240 (D.C. Cir. 1958); *cf.*, Levin, *Federal Control of Entry in the Broadcasting Industry*, 5 J. Law & Econ. 49, 61 (1962). These benefits from the exercise of market power in broadcasting must be candidly acknowledged as possible partial offsets against the potentially greater economic efficiency in the allocation of resources which increased competition can be expected to stimulate.[8]

If the desirability of competition here turned simply on assigning values to the foregoing economic considerations and weighing the resulting numbers against one another, I might be hesitant to say that the public interest demanded stricter control of concentration. However, an additional consideration must be placed in the scales: competition is a means of enhancing the potential for diversity of news and opinions[9] available to viewers, readers or listeners. The weight of this consideration seems to me decisive on whether increased competition in the advertising market is worthwhile. The dangers which concentrations pose to diversity of opinion seem to me sufficiently real to require the conclusion that a reduction in cross ownership in concentrated local markets serves the public interest whatever conclusions are reached concerning the effect of concentration on advertising rates or whatever judgment is reached about the economic effects of competition generally.

In so concluding, I have noted the argument of the NAB (among others) that we do not really need any additional diversity in the marketplace for ideas, that, indeed, we already have more diversity than we can handle. That assertion, buttressed in part by some interesting but irrelevant ruminations about "information overloads" and the like,[10] seems to me a feeble sophistry. Whatever the merits of these generalizations about how much information human beings can handle, nothing in them suggests that it is not a proper goal of public policy to continue to ensure that the information which the public receives and can absorb comes from diverse, competitive sources.

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[5] A number of empirical studies have attempted to measure the relationship between concentration and profit margins; the findings differ. Of those studies finding a positive relationship between concentration and high profit margins, the pioneering study is Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936–1940*, 65 Q. J. Econ. 293 (1951). Later studies include, for example, Mann, *Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries, 1950–1960*, 48 Rev. Econ. & Stat. 296 (1966); Collins and Preston, *Concentration and Price-Cost Margins in Food Manufacturing Industries*, 14 J. Ind. Econ. 226 (1966). The significance of these studies has been questioned, primarily on the ground that there has been no showing of a persistence of high rates of return in highly concentrated industries. It has been argued that the studies do not provide a basis for the recommendations of the 1968 White House Task Force on Antitrust Policy for a program to reduce concentration through divestiture. Brozen, *The Antitrust Task Force Deconcentration Recommendations*, 13 J. Law & Econ. 279 (1970). However, the studies, and the White House Task Force recommendations based in part on them have been defended by economist members of the Task Force, MacAvoy, McKie and Preston, *High and Stable Concentration Levels, Profitability, and Public Policy: A Response*, 13 J. Law & Econ. 493 (1971). For more recent analyses, compare L. Weiss, *Concentration-Profits Relationship and Anti-Trust* (unpublished manuscript, 1973) (concentration-profits relationship exists) with H. Demsetz, *The Market Concentration Doctrine* (1973) (no such relationship exists).

[6] Compare J. Rosse, B. Owen and D. Grey, *Economic Issues in Joint Ownership of Newspaper and TV Media*, Stanford U. Research Center in Economic Growth, memo. No. 97 (June, 1970) (finding correlation between newspaper ownership and higher rates), with A. Lago and D. Osborne, *A Quantitative Analysis of the Price Effects of Joint Mass Communication Media Ownership* (NAB Study, March, 1971) (finding no correlation between newspaper ownership and rates). These two studies differ not only in their findings but in their statistical methodology. In the absence of fuller information about the models used, neither study can be accepted as definitive. One flaw of both studies, however, is their reliance on a measure of advertising price which is irrelevant to most television stations.

[7] The role of advertising in economic welfare generally is a controversial one on which there is a wide spectrum of divergent views. See C. Robinson and E. Gellhorn, *The Administrative Process*, 362–370 (1974), for a variety of critical perspectives on the virtues and vices of advertising. A useful general survey and analysis of the economic consequences is contained in F. Scherer, *Industrial Market Structure and Economic Performance*, ch. 14 (1970).

[8] This is not to say that the public service benefits received are, in fact, commensurate with their economic costs—a matter on which there is at least ground for doubt. It is also not to say that the internal subsidy is the only or the best method for obtaining public service benefits. See *e.g.*, Levin, *supra*, 5 J. Law & Econ. at 64–66.

[9] Inasmuch as we are only concerned here with competition between broadcast stations and newspapers and not with new competitive entry into broadcasting, no account is taken of the benefits of competition in providing a new source of programming generally. But speaking of the general benefits of competition in the industry, this obvious benefit should be noted.

[10] See NAB Comments, 29–36. Reliance is placed on a few paragraphs from A. Toffler, *Future Shock* (1970). Nothing in Toffler's observations—even granting their validity—suggests that diversification of mass-media control ought not to be of concern. Toffler merely holds that it is hard for someone to concentrate on one thing while being buffetted about in a hailstorm of facts. FCC Commissioners have special reason to know this is true. But it proves nothing in the realm of limiting diversity of speech.

B. The "Wrong Forum" Argument

A number of opponents have urged that our mandate is to enforce the Communications Act, not the antitrust laws: that two especially expert agencies of government—the FTC and the Department of Justice—are already attending to antitrust enforcement matters, and that our efforts in this regard, if not *ultra vires*, are at least supererogatory.

As always, we must be careful, as Justice Holmes once admonished, to think things rather than words. To be sure, the fact that we do not enforce the antitrust laws per se shows that we are not *required* to apply specific antitrust criteria in measuring the adequacy of competition in any given case, as if the relationship between competition and the public interest were apodictic. *Cf., McLean Trucking Co. v. United States*, 321 U.S. 67 (1944); *Seaboard Airline RR v. United States*, 382 U.S. 154 (1965). But we are hardly barred from concluding that competition is what the public interest requires, and sound public policy does, in my judgment, require such a conclusion. Making anything of substance turn on the distinction between "antitrust standards" on the one hand, and a more general "public interest" standard on the other, obscures issues with labels. In plain fact, we have long held that antitrust concerns are important components of the public interest and we are entitled, if not obliged, to consider them here. See, *e.g., United States v. RCA, supra;* see generally, Bennett, *Media Concentration and the FCC: Focusing With a Section Seven Lens*, 66 Nw. U. L. Rev. 159, 165 (1971).

C. The "Ad Hoc Approach" Argument

In opposition to divestiture, ownership interests in the communications industry argue that we need not and should not adopt an approach toward cross-ownership which relies on the creation of favorable market structures for competition. Rather, it is urged, we ought to confine our concern to cases where combined ownership has been shown to have produced actual abuses. Adequate machinery—such as the Fairness Doctrine—exists, it is submitted, to prevent the worst consequence of economic concentration from ever occurring; and other machinery, such as antitrust enforcement, is sufficient to deal with competitive misconduct as it moves from potentiality to actuality. Furthermore, we have (it is urged) power to control actual abuses by promulgating rules of good practice or fair dealing designed to ensure that the power of combination is not abused, and, where clear abuse is shown, to order divestiture ourselves.[11]

This argument partly claims that we do not have power to structure the communications industry to suit what we conceive the public interest to require, and it partly claims that the public interest does not, in fact require "structural" rather than "behavioral" rules concerning competition.[12] We may leave the claim concerning the merits

[11] *Frontier Broadcasting Co.*, 27 FCC 2d 486 (1971) is cited as precedent. After the Commission set a renewal application for hearing on an issue of concentration of control, the co-owned station was voluntarily sold.

[12] I use the terms "structural" and "behavioral" to denote two different approaches to the promotion of media diversity. The structural approach looks toward promoting a market conformation hospitable to diversity and competition: the behavioral approach relies on regulatory standards to enforce norms of competitive conduct, chiefly by prohibiting certain sorts of abuses that commonly accompany concentrated ownership and control.

to the next section, and concentrate here on the legal part of the assertion. It is so frail as barely to survive exposition; even the most zealous of the non-interventionists concedes that we have a proper role where a literal monopoly controls the news outlets in a given market. If our jurisdiction to use the divestiture remedy in monopoly markets is conceded, it is inconceivable that we should not have discretion to apply structural remedies where market power may be exercised by a less-than-monopoly concern. The question is: how much market power should be tolerated? Reasonable men may differ as to how that question should be answered, but it is difficult to gainsay that, in principle, the job of answering belongs to us.

Nothing about the divestiture remedy per se requires any exceptional comment or pause. In the related Clayton Act context, divestiture has long been viewed as a flexible and useful tool, not only to break up consummated monopolies, but merely to avert a trend toward an oligopolistic market structure. See, *e.g., United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Alcoa*, 377 U.S. 271 (1964); and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). Similar results have been reached where Section 1 of the Sherman Act was concerned. *United States v. First National Bank and Trust of Lexington*, 376 U.S. 665 (1964).

The foregoing discussion establishes that we have, at least in theory, a proper role in implementing so much of antitrust policy as seems to us consistent with our mandate to promote the use and utility of radio communications in the public interest. But it seems to me that our authority goes further. We may play that role by following a structural rather than a behavioral approach—that is, by prophylactic rather than reactive measures respecting competition and diversity.

Some commentators urge that we should not employ a structural approach—meaning divestiture in many cases—absent evidence of actual competitive abuses, that doing so would be arbitrary, discriminatory and unduly punishing. The proper response to this argument is to point to the structural rules which we already have—for example the duopoly rules, the multiple ownership rules, and the one-to-a-market rules, none of which are premised on any showing of an identifiable abuse. These rules, like the rule adopted by the Commission today, simply embody a judgment that concentration in relevant markets is an impediment to effective competition and diversity of viewpoints. I can discern little sense in the view that our means of enforcing desired norms of diversity must be chiefly by policing *ad libitum*. It is like insisting that the swamps not be drained so long as the quinine holds out.

D. The First Amendment Argument

Finally, the First Amendment is invoked as a reason why we may not adopt structural diversification rules. According to this argument, the First Amendment would be offended by a rule that "discriminates" against the owners of newspapers—i.e., that prohibited to newspaper owners a right permitted to other orderly citizens—the right to be a Commission licensee.

The short answer to this submission is that it is not newspaper owners that are being aimed at—it is monopolies or oligopolies: and

these the First Amendment does not protect. Indeed, it may be argued that the First Amendment itself is against the creation and subsistence of such strong redoubts of economic and social power. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

II. PRUDENTIAL CONSIDERATIONS

The preceding discussion is meant to dispose of the legal or jurisdictional objections to our meddling in media cross-ownership. A number of additional arguments are addressed to our discretion rather than to our fundamental power. Several of these arguments deserve discussion before turning to considerations that suggest to me that the Commission's approach to cross-ownership is unnecessarily narrow.

A. The Fairness Doctrine

It is urged that oligopoly or monopoly in communications outlets, to the extent that they might seem to bottleneck the free flow of information to the public, need not be of concern to the Commission because the Fairness Doctrine will serve to assure that, in broadcast media at least, the public will receive reasonably balanced programming concerning controversial matters of public importance. It would be a serious mistake for us to rely on the Fairness Doctrine alone to serve the ends at which diversity aims.[13] What constitutes a controversial issue, what makes it public as distinct from private, or important as distinct from trivial, are concepts far too uncertainly anchored in consensus to be trusted to do the work of "a multitude of tongues." *Associated Press* v. *United States*, 52 F.Supp. 363, 372 (S.D. N.Y. 1943) (L. Hand, J.). We can rely on the Fairness Doctrine to keep a broadcast licensee in what it judges to be the mainstream of its community's mores, in a general, average way. But our apparent desire to encourage that result does not suggest, logically or as a practical matter, that we ought not to prefer that a community be exposed to as many such judgments as is feasible.

B. The "Newspapers Make Good Licensees" Argument

ANPA urges with great force that one of the best reasons on the merits for granting broadcast licenses to newspapers is simply that newspapers make superior licensees. They point to the track record of several newspaper-broadcasters to make their point. But their contention is beside the real point.[14] Deciding whether a licensee has

[13] Indeed, as the broadcasters frequently remind us, the constitutional contours of the Fairness Doctrine are by no means certain, see *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974), and may not even be fixed, see *National Broadcasting Co., Inc.* v. *FCC*, No. 73-2256, D.C. Circuit, Sept. 27, 1974, vacated, Dec. 13, 1974 (en banc). It is odd, to say the least, to hear from an industry that has often stated its dislike for (and active opposition to) the Fairness Doctrine that we may rely on that doctrine to ensure diversity.

[14] It is also inconsistent in some sense with the assurances that newspapers and TV stations are operated separately. If they are truly separate operations, then how would newspaper ownership nurture quality in television broadcasting? Wherein lies the special virtue of a newspaper interest that is totally separated from the operation of the station? Pressed during oral argument for an explanation of this seeming contradiction the typical response of media owners was to fall back on general statements about the responsibility of newspapers, their keen awareness of local community needs and interests, etc. This explanation leaves something to be desired. What one wants to know is not whether newspapers are good citizens but how their special virtues as citizens are translated into broadcast operations that are, supposedly, independent of any working relationship with the newspaper.

been "good" or "bad," as we all know, is at the best a delicate job, and one that invites invidious, possibly even illegal government action. In order to avoid the temptation to introduce our personal predilections as significant determinants of licensee evaluation, we automate the normative functions as far as is practical. That is the meaning and advantage of structural rather than direct behavioral controls on the markets. All agree that competition in the arena of ideas is a good thing; I also assume that common ownership tends to erode competitive zeal. All agree that diversity of viewpoints is desirable; I also assume that common ownership tends to create an identity of outlook that can lessen diversity.[15] Similar assumptions have always governed the Commission's past action in this area. Suppose someone proposed to buy two television stations in the same market, pledging that both stations would continue (as before) to operate with separate staffs, separate editorial policies and separate identity. Could the Commission allow such a double-acquisition without patently abusing its authority? I think not, and I see no basis for a different judgment here.[16]

If we do not automate the judgment concerning what constitutes a "good" licensee—if we leave it to clinical, case-by-case judgments—there is some superficial force to the assertion that newspapers make superior licensees since some newspaper-owned stations have a reputation for being among the best stations in the country. But everyone should appreciate how very subjective and impressionistic the evaluation of such "reputation" evidence is.[17] It invites, I repeat, invidious if not illegal government action, for there are simply no generally agreed-upon criteria that can be used to decide what constitutes a "good station." I do not think we can claim to have reliable, objective evidence that newspaper-owned stations are better than other stations.

The Commission, in passing, notes the results of a statistical study by our staff that found co-owned stations programmed more local news, and local non-entertainment programming, and more local programming generally, than independently-owned stations. (See Appendix C of the Commission's opinion.) On the other hand, similar studies by a leading economic scholar of communications (which have not been effectively rebutted) indicate no significant difference in news or public

[15] The fact that the stations and newspapers operate with separate staffs is largely irrelevant if both staffs are selected so as to share a common outlook, or if the staffs—recognising the fact of common ownership—come to act on the basis of shared interests.

[16] I do not mean to say that the foregoing hypothetical case settles whether there ought to be rules about separate ownership; but it does settle whether, once there are such rules, mere protestations and assurances concerning the propriety of waiving them ought to satisfy us.

[17] In fact, the argument is made, and supported with some more or less "soft" evidence (much of it in our own files), that many newspapers are far from the model licensees that they are made out to be. See Barnett, *Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary R. Markle Foundation* (mimeo 1974). The evidence on this score is certainly not so overwhelming as to indict newspaper licensees as a class, but neither is it so negligible that it could be altogether ignored on the question of licensee "goodness"—if we really wanted to consider such matters in fixing our policy of diversification.

affairs programming, and no significant difference in the character or diversity of other program types.[18]

Asking whether newspaper owners would provide more diversity among different program types is perhaps the wrong way to go about ascertaining whether such owners have a high "good quotient." We ought not to assume that the kind of "goodness" we really want in a station is measured simply by diversity among different program types, the relative percentage of situation comedies, news, public affairs and the like. On the other hand, it is about the only way we can get any kind of objective handle on program quality, without getting into the business of making subjective valuations of programming content, a course that, needless to say, raises grave First Amendment problems.

This constitutional backdrop illustrates the principal difficulty with the whole character of the defense offered in support of newspaper-owned stations. We are asked to make a determination that these are "better" stations, but in the nature of things the only way one can really determine that is to make the kind of qualitative judgments that both the First Amendment and sound public policy would seem to forbid.[19]

C. The Risk of Nonpersuasion

No discussion of the merits of newspaper cross-ownership or divestiture can be complete without coping with the question of who bears the risk of non-persuasion. Ordinarily, as ANPA strongly urges, proponents of a change in the status quo have the burden of coming forward with evidence. In this case, I submit that the burden lies the other way. As a corollary to our belief that a comprehensive, unconcentrated ownership structure is prima facie in the public interest, it is up to the media owners to establish public interest tradeoffs sufficient to outweigh the assumed bad effects of concentration. The Commission need not attempt a detailed showing to prove precisely the

[18] Levin, *The Policy on Joint Ownership of Newspapers and Television: Some Assumptions, Objectives and Effects* (April 1971). See also Levin's clarifying memorandum of December 1971, and supplementary comments, May 1974. As summarized in the last submission, Levin's statistical analysis found the following:

I. Newspaper ownership does not affect:
(a) The diversity of program types in the market.
(b) Profitability.
(c) Revenues.
(d) Time sales.
(e) Audience size.
(f) Amount of news.
(g) Amount of high-brow entertainment.
(h) Amount of low-brow entertainment.
(i) Amount of feature films.
(j) Amount of local programming.

II. Newspaper ownership has a very small positive effect on:
(a) The diversity of program types presented daily on the station ("vertical diversity") (i.e., less than one-tenth additional program type per day);
(b) Minutes of public affairs (plus 17 minutes per week).

However, these effects are much smaller than the effects of other variables.

III. In one-station VHF markets, newspaper ownership does not affect any of the above, except it has a small negative effect on:
(a) Amount of local programming (minus 135 minutes per week);
(b) Amount of non-network programming (minus 180 minutes per week).

[19] Even if we were to admit subjective judgments into consideration, it would have to be remembered that what we may deem to be high quality in newspaper ownership may reflect, not the fact that a newspaper owns the station, but other factors: the station may be "better" simply because of its network affiliation, or because it is in a major market with a large audience. This latter point bears special notice in view of the argument of combination owners, that co-owned stations and newspapers are managed and operated in *total* independence of each other.

vices of cross-ownership and each particular public interest benefit that may be expected to flow from divestiture. Once it is established that a given ownership structure is inadequately competitive—in other words, that it is concentrated to a degree that poses a significant possibility of uncompetitive behavior—the Commission's burden is at an end.[20] This allocation of burdens seems to me decisive of the basic question. I find nothing in the record to demonstrate that newspaper ownership of broadcast stations, in general, offers the public any distinctive benefits. Of course, in individual cases it may be that such a showing could be made. Such a showing—whether of unique public benefit or of extraordinary private hardship—could be handled with a waiver—a time-honored tradition of FCC rulemaking. Accordingly, we need not shy away from a general rule simply because its rigid application may create some public or private hardship. The remedies for such hardships are familiar and close at hand.

III. MEASURING CONCENTRATION

A. Market Definition: Product Market

There is no exact science to the definition of line of commerce, or product market, as the Merger Guidelines of the Department of Justice (see 1 CCH Trade Reg. Rep. para. 4430) make very clear:[21]

> The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality and use. In this latter case, however, it may be necessary also to include in that market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality and use from the standpoint of that group of purchasers for whom the two products are equally interchangeable.

While a variety of subjective judgments are often required in determining whether products are substitutes and in drawing market boundaries, these judgments can be supplemented in most cases with empirical evidence. Do the prices of the goods appear to move together? Does an increase in the relative price of one good influence the demand for the others? Are the goods in fact interchangeable in

[20] In response to the submission of the Department of Justice that competition and diversity are presumed to benefit the public, the submission of one opponent—typical of the tenor if not the phraseology of most opponents, was that allocating the burdens so was tantamount to telling a homeowner that he must show why he should be permitted to retain his house. The analogy is arresting in that it illustrates how some broadcasters regard their licenses—as property. This view, to say no more of it, is simply at odds with our statute. To be sure, we do, as a practical matter, usually renew licenses indefinitely, a practice consistent enough to raise a certain informal equity in protecting investment and in rewarding service when and if it has been performed. But this informal equity should not be used to impede the erection of a framework within which that equity, and the expectations formed in reliance thereon, is constrained. Any contrary conclusion insulates the status quo from all competing claims of public interest as these may ripen in light of changing needs and changing perceptions of needs.

[21] A brief scan of the precedents likewise shows that the relevant criteria are far from concrete. Compare, for example, *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964) (glass and metal containers constitute single line of commerce); *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964) (copper and aluminum conductor are separate product lines). See generally, *Brown Shoe Company* v. *United States*, 370 U.S. 294 (1962).

terms of production or in consumers' consumption bundles? Unfortunately, this type of empirical evidence has not been assembled and analyzed in this proceeding.

In any event, it is important to distinguish between the two sets of "products" we consider here: (1) advertising and (2) the dissemination of news and opinions.

(1) The delineation of a product market for advertising is deceptively difficult. I believe that one must accept the notion that newspaper and television advertising are competitive services to some extent, but I must acknowledge the possibility that the cross elasticity of demand may not be large. For some products, they are obviously not good promotional substitutes while for others print may serve just as well as broadcast messages. I also concede that insofar as other forms of advertising are substitutes for print or broadcast messages, the advertising market includes other media which presumably offer some competition to newspapers and television stations. Having issued this caveat, however, I still stand by the conclusion that newspaper and broadcast advertising are sufficiently close substitutes to justify our regarding them, for purposes here, as the same "line of commerce."

(2) Delimiting the market for dissemination of news and opinion is equally problematical, but in this instance there are few empirical data to guide us. It is virtually impossible to determine the relative importance of various media upon local citizens' knowledge of contemporary affairs. While it may be that especially well informed citizens draw their information from a wide variety of sources—daily newspapers, magazines, weekly newspapers, television, radio, and various professional newsletters—as a practical matter, it seems to me unlikely that most citizens avail themselves of the full variety of sources available. Such evidence as we have corroborates the intuition that television, newspaper and radio are the dominant sources of information.[22] On this conclusion I believe we are amply justified in striving for diversification of control of these media within the same geographic market.

B. Geographic Market

The above considerations argue for quite different approaches to the demarcation of geographical boundaries in defining the relevant market. For advertising, the important question is whether a given medium competes for exposure to audience (readers, viewers, or listeners) for promoting a particular group of products or services. The media in effective competition with one another in this respect may not be alternatives for disseminating news and opinions concerning local or regional matters. For both product markets, a number of alternatives are before us. One, argued by the NAB and endorsed by most of the media interests, is the so-called Area of Dominant Influence (ADI), employed by advertisers to define markets for purposes of advertising sales. A second, suggested by the Justice Department and others, is the Standard Metropolitan Statistical Area (for markets outside officially designated SMSA's, presumably something like Urbanized Area could

[22] H. Litwin & W. Wroth, *The Effects of Common Ownership on Media Content and Influence* (1969).

be used). A third, which is suggested by some of our own prior precedents,[23] is the service contour of the co-owned station (Grade B, Grade A, or City Grade, or their radio counterparts, could be used—with widely divergent results). Each of these different approaches to market definition does have something to be said for and against it. But for present purposes the market area in which we are interested is not the area served by one or the other of the co-owned firms, but that area in which their service overlaps.[24]

For purposes of its prospective ban on newspaper-television cross-ownerships, the Commission implicitly [25] regards the Grade A service area of the co-owned television station as the relevant geographic market for purposes of banning newspaper-television (comparable service areas are drawn for radio-newspaper) ownerships.[26] Following the majority's approach of banning all (future) common ownerships within the Grade A contour of the station, the use of a Grade A contour standard actually imposes a stricter standard—for purposes of a prospective ban—than would be suitable under an approach which uses the market concept as a framework for measuring concentration. The majority, in other words, uses the television/radio contours as the criterion for deciding in what area co-ownership ought to be banned. My view is that, since concentration of control is the evil to be eliminated, engineering contours without more will not necessarily yield the information we presumably want, and ought not be depended upon to do so. It might be acceptable to use the Grade A television service contour (or its aural equivalent) to describe a geographic area in which concentration would be measured; but this approach, in my view, would artificially dilute the concentration figures. I believe it much more realistic to measure concentration with reference to the city or urban area (or perhaps in larger cities, the SMSA) in which the co-owned facilities exist. However, I would then ban *existing* as well as future ownerships in such of those markets in which there was an "undue concentration" according to criteria described below.

C. Competitive Foreclosure: Determining the Threshold

My greatest difficulty with the majority is not with its approach to market definitions, but with its determination of the tolerable level of

[23] The word "some" merits special emphasis for the Commission's precedent is far from clear and anything but consistent. The following is a short sample of recent decisions and criteria used as the principal determinant of market definition for the purpose of measuring concentration and diversity of media.

City of License-Frontier Broadcasting, 21 FCC 2d 570 (1970) (TV Renewal), *Gale Broadcasting Co.*, 15 P&F Radio Reg. 2d 337 (1969) (FM Sale).

City and Surrounding Area-Jonquil Broadcasting Co., 18 P&F Radio Reg. 2d 243 (1970) (AM Sale), *The Evening Star Broadcasting Co.*, 20 P&F Radio Reg. 2d 1311 (1971) and *Federation of Citizens Association-D.C.*, 17 P&F Radio Reg. 2d 1113 (1970) (TV Renewals).

Station Contour-Cumberland Gap Broadcasting Co., 24 FCC 2d 393 (1970) (FM CP), *KSOO-TV, Inc.*, 28 P&F Radio Reg. 2d 1271 (1973) (TV Sale).

[24] I stress this obvious point only because it seems to have been ignored by many of the advocates in this proceeding (most notably the NAB), who have argued in effect that the widest area served by the newspaper or station be used to measure competition and concentration.

[25] The point is somewhat obscured in the majority opinion. The Grade A contour is used to define "co-owned" rather than to measure concentration. Under my approach the "market" is defined for purposes of measuring the degree of concentration. Incidentally, it should be noted that, while only television-newspaper markets are dealt with here, I am concerned with basic concepts and the same concepts are applicable, *mutatis mutandis*, to aural-newspaper ownerships, and also television-aural combinations.

[26] For purpose of divestiture the majority adopts a much different approach, one which is not based on any concept of market definition but simply on a restrictive view of what constitutes impermissible concentration.

concentration for existing combinations. The majority's acceptance of a high level of concentration for existing stations is particularly disturbing given the rather remote possibilities for new entry into television broadcasting.

The Justice Department urges upon us the adoption of the Clayton Act Section 7 standard of illegality which is based upon numerical market shares and the trend in concentration. The highwater mark in Section 7 litigation was reached in *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), where the Court found a violation in a merger of two grocery chains which, between them, embraced but 7.5 percent of the relevant market. The Court's standard depends not only on the alarm with which it views trends towards increasing concentration in an industry; it is also conditioned on the possibility that new entrants can invade a market which has become noncompetitive. In local television and newspaper markets, concentration is not likely to decline much further, but new entry is equally unlikely. New television stations are obviously not likely to spring up in concentrated markets unless the Commission changes its allocations plan. Entry by new central-city newspapers is even more unlikely. Thus, we are dealing in an area in which concentration cannot be reduced by market forces unless it occurs through new entry in weekly newspapers, magazines, advertising/news circulars, or other less important advertising-information media.

Given the relative immutability of media concentration, the prudent approach is to adopt a rather strong standard for cross-ownership. I do not believe that we should imitate the antitrust case law by distinguishing between new combinations and older agglomerations of market power because we cannot presume that market forces will eventually lead to increased competition through new entry. Whether this standard should be based upon concentration ratios—computed on the basis of audience or advertising shares—or less precise data, the standard should be the same for divestiture and new cross-ownership and it should be sufficiently stringent to be at least consistent with earlier Commission decisions dealing with media concentration.

An examinaiton of immediately relevant precedents in this area indicates that the Commission's administrative standards for judging competition or concentration have, at least until now, been more rigorous than the judicial standards noted above. In its earlier action in this docket the Commission prohibited common ownership of VHF television and aural stations regardless of the number of television or aural station competitiors in the market. So also in its duopoly rules the Commission prohibited common ownership of television stations with overlapping Grade B contours—again irrespective of the number of competing stations in the market area. See 22 FCC 2d 306 (1970). In both these situations it is easy to imagine individual ownerships within the ban of the rule that would not meet, for example, the 30 percent foreclosure test in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

Obviously, application of these precedents here yields different results depending on the precedent chosen, the particular mode of measurement and so on. For example, if the *Philadelphia Bank* standard of 30 percent foreclosure of the market is translated into station-audience/newspaper-circulation shares for the co-owned facilities within the "home city" (urban area in which both facilities are located), divestiture would be required in some 67 combination ownerships.[27] A *Von's Grocery* standard would require divestiture of all combinations. Reliance on our own past precedent in this area would suggest we ignore data on concentration ratios, whether measured by audience shares or other indicia of market strength, and simply ban all common ownership regardless of market shares. The majority has here adopted this latter standard—for future combinations only.

I could accept either the 30 percent concentration standard of *Philadelphia Bank* or a stricter, flat proscription of combinations in all markets, regardless of degree of concentration; the latter has the very substantial advantage of administrative convenience. What I cannot accept is the standard adopted by the majority for purposes of divestiture—that is, taking the worst cases of market concentration and distilling therefrom only those markets where the newspaper-owned station provides the only City-Grade television service.

For purposes of banning future acquisitions—including transfers of combined ownerships—the majority is prepared to find that the combination of newspaper and television stations within a prescribed service area of the station involves an impermissible degree of concentration. But it is unwilling to apply this standard to existing combinations. Instead, it adopts a standard requiring divestiture only where the city in which the combination exists receives only a single City Grade service (or comparable service for radio-newspaper situations)—in short, cases where there is a virtual monopoly of the relevant media. This is unacceptable to me. If divestiture is warranted at all—and I think it clearly is—I do not see how it can be confined to a bare handful of small markets in which there is monopoly. The fact that non-monopoly combination markets have a relatively more competitive structure should not obscure the fact—and the majority acknowledges it to be a fact—that the structure of these markets is *inadequately* competitive.

The inadequacy of the Commission's approach to divestiture is underscored by the fact that, in confining divestiture to a handful of small, monopoly situations, it is confining effective relief to markets where competition may prove, ultimately, to be unfeasible. Stations (or newspapers) in these small markets may be marginal operations with the least potential for sale at a reasonable price. Small market owners could well be the most attractive candidates for waivers in

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[27] This is based on prime-time audience shares for the television station and daily circulation shares for the newspaper. See Baer, Geller and Grundfest, *Newspaper-Television Cross Ownership: Options for Federal Action*, 14 (RAND 1974). The RAND study gives a useful analysis of various alternative criteria for measuring concentration and how it would affect the results.

order to avoid, for example, undue financial hardship.[28] Indeed, the majority appears to recognize as much—almost to the point of inviting waiver requests. Five years from now, I think we may find that no divestitures at all have taken place. I regard that as an inadequate solution to the serious concentration problem which the majority itself concedes to exist.

IV. THE CASE FOR DIVESTITURE

It is true, of course, that a prospective ban conforms to Commission precedent in connection with the duopoly and television-aural combinations. However, what we have done in the past does not dispose of the merits of divestiture in this case. In broad terms, we have three issues before us which we must carefully consider: (1) the need for divestiture, (2) the effect of divestiture (herein the question of "equity"), and (3) the legal authority of the Commission to order it.

A. Need for Divestiture

The desirability of divestiture is made out simply by observing that, in the absence of divestiture, a rule banning cross-ownership of newspaper-television stations will mean very little. As NAB's advocate pointedly expressed it in oral argument: "a prospective ban would be purely academic." While I am loath to equate the term "academic" with "meaningless," I agree with his conclusion. I think it is quite plain that the real cause for concern is existing combinations, which will not soon dissolve themselves. With regard to prospective applications for new combinations, the number of such possible applications is too small to be worth troubling about. Certainly it is not worth four years of rule-making deliberation.

Nothing in the majority opinion effectively disputes either of these propositions. In most of the markets involving newspaper-television station ownerships the stations have been commonly owned since the time of original license. Very few of the common ownerships that have been created have been dissovled by transfer of control or assignment of license. In fact, the very point has been strongly urged as one of the singular virtues of such ownerships. We are told by opponents of the ban on common ownership that newspaper licensees offer stability because, among other things, they do not traffic in licenses. I am not persuaded that non-trafficking is a virtue to be accorded any great weight; our rules forbid trafficking in any case. Furthermore, it may be that the stability of newspaper ownership is simply

[28] I do not mean to imply that I would likely be moved by waiver requests. I am skeptical that many, if any, plausible cases for "hardship" waivers exist. But I do concede that the Commission should give a fair-minded hearing on a prima facie showing by an applicant that divestiture would be an unreasonable hardship or otherwise would not serve the public interest in a special case. Indeed the law requires that we allow for the possibility of waiver. *WAIT Radio v. FCC*, 418 F. 2d 1153 (D.C. Cir. 1969).

One especially sympathetic situation for a waiver might arise if a broadcaster decided to found a daily newspaper. One need not anticipate this circumstance frequently arising, but it is not impossible; see, *e.g.*, "Wichita Broadcaster, Countering Trend, Starts a Weekly Paper," New York Times, Oct. 29, 1974.

a result of the fact that newspaper-owned stations are, on the whole, well-located and profitable. Besides, the very stability of ownership proves the point that we cannot realistically rely on future transfers to dissipate the concentration of ownership.[29] As for the second point, concerning possible future application by newspaper interests for stations which would fall within the scope of our rule, it suffices to observe that in the past decade the number of such applications has been negligible.[30]

B. Effects of Divestiture

The majority rejects the remedy of divestiture for newspaper-television station combinations in all but a very few cases of pure local monopoly. The reason they give for treading so lightly on existing combinations while enacting strict standards for prospective combinations is a professed fear of disrupting the "stability and continuity" of the local broadcasting service. This justification seems to me a makeweight; if it were not, I doubt whether the Commission would routinely approve the numerous transfers of broadcast licenses it passes on each year. If transfer of ownership is disruptive, *per se*, it should be no more disruptive when ordered by the Commission than when undertaken voluntarily by the licensee.

But, of course, as we all know, the mere transfer of ownership of a broadcast station or of any other business enterprise need not be accompanied by any disruption of its daily affairs. Management and operating personnel frequently remain with the enterprise, assuring a smooth transition. Indeed, any other action by the new licensee would only reduce the value of his franchise. Therefore, absent any contrary evidence, we have every reason to believe that even the most ambitious divestiture policy would have very little effect upon routine broadcast operations.

It is argued by opponents that a divestiture policy might actually undermine diversity because without the advantages of joint ownership, some stations, or some newspapers, might be forced into bankruptcy. Although the argument is sometimes expressed in terms of newspapers subsidizing marginal stations, the reality generally seems to be the other way—that newspapers are being subsidized by stations. Such was reportedly the case with Channel 5 in Boston, and such is allegedly

[29] It is true that a number of combinations has been reduced somewhat in recent years, but one of these (WHDH–TV in Boston) was ordered by the Commission; another (KFBC–TV in Cheyenne) was influenced by threatened Commission divestiture (a hearing had been designated on the issue of concentration). In a third case, which is pending, it is apparent that the transfer is influenced by the desire to eliminate the need for FCC approval (and possible denial) of a merger between two large newspaper chains. Voluntary divestiture may also have been designed to soften possible Justice Department opposition to the merger. In a fourth case the elimination was the result of the failure of a UHF station in a marginal market. In other cases it is not known what factors may have influenced the elimination. However, some of these may have been influenced by the threat of forced divestiture as a result of the Commission's rulemaking proceeding and the Justice Department's vigorous opposition to renewal of newspaper owned stations in several major markets. In short, there is no reason to expect a continuation of this "trend"—if it can be called that—in voluntary separation of ownership. But even if it did continue, at a rate of, say, three per year (approximately the rate over the past four years if one discounts the above-mentioned special cases) it would not suffice. I do not think the public should have to wait 25 to 30 years to realize the benefits of competition—benefits which, we are all agreed, the public is entitled to. This is especially true when one considers that ultimate voluntary separation is not assured.

[30] As best I can ascertain—the Commission's records are not instructive on this point—there have been none since at least July 1970.

the case in other markets as well.[31] To the extent that this is the problem, I think the Commission ought to give slight weight to it, as a general matter, for several reasons.

First, we do not have any reliable information on the degree of cross subsidization and what would happen to current newspapers after divestiture. The fact is, however, that if the stations were sold at a reasonable profit, the profit could be re-invested in another enterprise which could support the paper as well as a broadcast station could. Why should cross subsidy—assuming it is a good thing (a temporary assumption to be examined momentarily)—only be achieved by operating a television station? If an owner wishes, for whatever motive, to subsidize an unprofitable newspaper, I see no reason why he could not do so just as well by taking the proceeds from the sale of the station, investing in some other lucrative enterprise, and using the resulting income to support the newspaper.[32]

Second, whatever the general public interest merits of subsidization of newspapers I do not think that this is, in itself, a proper concern of the FCC. That does not mean that we could not accept, as a reason for not requiring divestiture, a showing that the newspaper would fail were divestiture required. This "failing company" defense has been recognized in antitrust law since *International Shoe Co. v. FTC*, 280 U.S. 291, 302–303 (1930), and I am prepared to entertain it in an appropriate case. As a general proposition, however, I doubt that I would accept the failing company argument as an automatic and absolute defense in the case of broadcasting; I question the wisdom of encouraging the use of broadcast profits to support other, failing business, even newspapers.[33] However, in any event, I would accept the defense only on the limited conditions which have been imposed by the courts in antitrust decisions. The two major limitations, enunciated in *International Shoe* and adhered to by the courts since, are: (1) the

[31] For example, in Washington, D.C. broadcast holdings of Washington Star Communications are allegedly subsidizing the newspaper subsidiary, The Star-News. I use the terms "reportedly" and "allegedly" to underscore the fact that in neither case are the established facts sufficient to support definite conclusions that there is cross subsidization. In the Channel 5 case the fact that the co-owned newspaper (the Herald-Traveler) merged with another newspaper after the station (WHDH) failed to be renewed proves nothing, unless it is also shown that it would have continued if the co-owned station's license had been renewed. In the case of Washington Star, there is an allegation by the owners that the co-owned stations (AM–FM–TV) are necessary to support the newspaper (Applications to Transfer Control, BTC–7601), but we have yet to ascertain what the facts are.

[32] The counter to this may be that no other such lucrative enterprise offers the same possibility for cross subsidization. There are two possible anchors to this speculation. One is that no other investment is quite so profitable as a television station, the other is that economies of scale permit special saving. If the first statement is true, however, it is irrelevant because the supra-normal profitability of the station would be capitalized in the sale price leaving the former owner with the same present-value of capital as before. The second statement would appear to be at odds with the owners' argument that stations and newspapers are separately managed and are, as news gathering and entertainment vehicles, genuinely unrelated.

[33] Even assuming that it is appropriate public policy to subsidize newspapers, it is not at all clear that broadcast profits are better put to this purpose than to enriching the program offerings of the broadcast stations. Internal subsidization is hardly an unknown technique; it is familiar not only to the broadcast industry but throughout the regulated sector. See Posner, *Taxation by Regulation*, 2 Bell J. Econ. and Mgt. Science, 22 (1971). It would seem more efficient, however, and more in accord with *FCC* policy, to see that the subsidy is devoted to support unremunerative *broadcast* services, rather than newsprint services. As to the supposed benefit of supporting competition for the co-owned broadcast station, the question that needs to be asked is whether under these circumstances of co-ownership there is adequate competition. It is not a full answer to this question to say that this competition is better than none since subsidization of a failing newspaper may serve to retard new competitive entry—in some form—that may take the place of the old service.

resources of the acquired firm "are so depleted and the prospect of rehabilitation so remote" that the firm faces "the grave probability of a business failure"; (2) there is "no other prospective purchaser." *International Shoe Co., supra*, 280 U.S. at 302–303. See also, *e.g.*, *Citizen Publishing Co. v. United States*, 394 U.S. 131, 136–37 (1969).

In addition to the arguments that a divestiture policy might lessen diversity, the NAB has also argued that divestiture would disrupt station finances and that it would be unfair to investors who had put up money on the strength of the expectation that the property they had invested in would be left intact. Such arguments have very little weight. The proposed rule would not require the owner to forfeit its interest; the station would be sold—with the capital value of the franchise included in the sale price, or one station could perhaps be exchanged for another station. Even if the forced sale should return something less than the expected value, this should, I think, be of little concern. In most instances the facility will have returned the original investment to the owner several times.[34]

There is another argument that can be similarly dismissed—that because the large stations are so expensive, any forced divestiture would lead to large group owners coming into the local markets because they would be the only ones that would be able to afford the expense. This proposition I find most doubtful. The expensive large market stations would find little difficulty in attracting capital. Banks are happy to lend money to responsible entrepreneurs, especially those lucky enough to stumble on the opportunity to buy, for example, WTOP–TV; I do not believe we will have to wait for ITT to come along to make such a purchase. And, in any event, the FCC can condition the transfer upon approval of the future owner. It is true that, under Section 310 of the Communications Act, the Commission is forbidden to consider whether a transferee is the best among other possible candidates. But this prohibition does not deny the Commission the power to ensure that any transferee of the station meets the basic qualifications which are embedded in its general rules and any special conditions which it might create for the particular purpose of the transfer for the divestiture.[35]

C. Legal Authority for Divestiture

The argument has been made by some opponents of the rule that the FCC does not have authority to order divestiture of existing owner-

[34] For original licensees, this point seems quite obvious, especially in the concentrated markets with which we are most concerned. For licenses which have been recently acquired through transfer (and the franchise value thereby capitalized into the value of the station) there is some possibility that the current owner may not have fully recouped its investment. Even here, however, I am unwilling to assume that the public interest compels us to ratify the licensee's expectation that its three-year license constitutes a perpetuity which should not be revoked when other, and weighty, public interest considerations may require it.

[35] I am not at all clear that it would be such a bad thing for new multiple owners to be attracted into television broadcasting—conceding, *arguendo*, that a divestiture policy would have this result. Whatever our policies may be respecting co-ownership, group ownership constitutes a bulwark—and to my mind a highly desirable one—against the economic power of the networks.

The contention that divestiture would cut against our policy of local ownership and bring in a new crop of non-local owners is far from impressive. The local ownership policy has never represented an especially strong preference of the Commission's. But even if it bulked large on our agenda of values, it would be difficult to swallow coming from its present proponents, considering the number of major market broadcast outlets that are owned by non-local newspaper chains.

ships, in absence of specific statutory authority—even if such ownerships were found to be in present violation of an FCC rule. This argument rests on the mistaken premise that every particular aspect of our authority must be traced to some clear statutory term. If any such an assumption could have survived *NBC v. United States*, it clearly gave up the ghost with *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

I do not wish to overstate the FCC's authority; in fact, it is not necessary even to concede the expansive powers suggested in *NBC* and affirmed in *Southwestern Cable* to sustain the action here. That we have the basic authority to promulgate rules of this general character cannot be reasonably disputed. On the question of our general rulemaking power, *Storer Broadcasting Co. v. United States*, 351 U.S. 192 (1956) is dispositive. On the question of agency power to enact rules and enforce them retroactively against existing license interests, *American Airlines, Inc.* v. *CAB*, 359 F. 2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966), affirmed just such a power. See also *WBEN, Inc. v. United States*, 396 F. 2d 601 (2nd Cir.), *cert. den.*, 393 U.S. 914 (1968). Authority in the present case follows *a fortiori* from these precedents in light of the fact that the interest in a broadcast license is limited and conditional. It is subject to application for renewal at the end of a three year term and the renewal application is subject to such rules and conditions as are in effect, not during the license period, but at the time of the renewal. *Transcontinent Television Corp.*, 308 F. 2d 339 (D.C. Cir. 1962).[36]

Opponents of the rule have attempted to make divestiture something special, a distinctive remedy requiring specifically granted authority. But, on the contrary, divestiture here is nothing more than the consequence of an immediate application of a general regulation declaring a public interest term on which licenses shall be permitted to operate. The effect here is identical to the effect given the rule in *American Airlines*. It is also identical to the effect of the rule in *Transcontinent* given the fact that the divestiture here is to take effect only after a future period that exceeds any present license period. By way of conclusion, one general observation: it is very important that it be recognized that this proceeding, and the concerns underlying it, results in significant part from our own previous decisions in allocating the broadcast spectrum. The Commission's objective of stimulating localism required that television frequencies be dispersed as they are—and the result has been that most television markets are highly concentrated.[37] In a very real sense, the fact that Cleveland has only three VHF stations makes similar concentration in Kansas City inevitable. The only way additional television stations could

[36] Concededly, an interest in reasonable flexibility and fairness in adjusting general rules to individual cases dictates that we leave open the possibility for waiver. That is assumed with all our rules. See *Storer Broadcasting, supra; WAIT Radio v. FCC*, 418 F. 2d 1153 (D.C. Cir. 1969). Nothing we do here precludes us from considering pleas for individual, special treatment, where it can be shown to be necessary. But the possibility of special dispensation to serve the needs of equity does not undermine our power to make general findings of public interest and apply them generally without individualized proceedings.

[37] For a general critique of localism and an attempt to assess its costs in terms of foregone diversity and additional services, see R. Noll, M. Peck and J. McGowan, *Economic Aspects of Television*, ch. 4 (1973).

possibly get enough advertising revenues to survive would be for new networks to form, a development which is made impossible by the absence of a fourth or fifth equivalent frequency assignment in most markets. Thus, Commission policies themselves must bear a large portion of the blame for local market media concentration. I do not say that important benefits do not result from this policy of localism. But there are certainly substantial costs in terms of foregone potential for greater diversity. The fact that we adhere to a local allocations policy does not undercut the case for completion and diversity; it rather underscores the high importance of adopting all feasible measures to offset the limitations which a localism policy imposes on competition and diversity. The present proceeding seeks to do this in a modest way. I regret that the Commission has not gone further, by requiring general divestiture.

Appendix C

FCC 75-627

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 73.34, 73.240, AND 73.636 OF THE COMMISSION'S RULES RELATING TO MULTIPLE OWNERSHIP OF STANDARD, FM AND TELEVISION BROADCAST STATIONS	Docket No. 18110

MEMORANDUM OPINION AND ORDER

(Adopted May 28, 1975; Released June 5, 1975)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT; COMMISSIONERS HOOKS AND WASHBURN ABSENT; COMMISSIONER ROBINSON CONCURRING IN PART AND DISSENTING IN PART.

1. The Commission has before it a series of pleadings [1] dealing with our recent decision [2] adopting rules governing cross-ownership of daily newspapers and television or radio stations in the same local area. Some of these pleadings are filed by parties subject to a divestiture requirement under the newly adopted rules, and in such cases seek either a clarification or an alteration of the standard we indicated would apply to the need for such divestiture. Some background information to place the subject in perspective is required.

2. In the *Second Report and Order* the Commission held that the public policy considerations favoring greater diversity of ownership (and on which the Commission relied in adopting a prospective rule) were not the only points to consider in examining existing daily newspaper-television station cross-ownership from the point of view of the possible need for divestiture. In addition to the theoretical advantage of greater diversity, the Commission determined that it was necessary to take into account the impact of any possible divestiture requirement on the public and affected parties alike. For existing stations,[3] the balance was drawn so as to require divestiture by January 1, 1980, only in instances where the degree of media concentration (*i.e.*, lack of diversity) could be labeled as egregious. Seven television stations and nine radio stations were affected by the divestiture requirement. Under Sections 73.35(c), 73.240(c) and 73.636(c) of the new rules, television

[1] Petitions for Reconsideration of the *Second Report and Order* in this proceeding filed by (1) James B. Skewes and Southern Television Corporation, licensee of Station WTOK-TV, Meridian, Mississippi; (2) The Brockway Company "Brockway", licensee of Station WWNY-TV, Carthage, New York; (3) The American Newspaper Publishers Association ("ANPA"); (4) Gray Communications System, Inc., licensee of Station WALB-TV, Albany, Georgia; and (5) Radio Stamford, Inc., applicant for the facilities of Stations WSTC AM and FM, Stamford, Connecticut. The licensee of the stations, Western Connecticut Broadcasting Company, filed an Opposition to this petition. In addition, a pleading titled Petition for Reconsideration was filed by the Findlay Publishing Company, licensee of Stations WFIN(AM) and WHMQ(FM), Findlay, Ohio, but the relief requested is different from the other petitions as is explained below.

[2] *Second Report and Order*, 40 Fed. Reg. 6449 (1975).

[3] Separate provisions of the new rules bar the creation of new combinations or the voluntary sale of existing combinations to a single party, on terms that are stricter than those provisions dealing with divestiture. (See footnote 6.)

station-daily newspaper combinations or radio station-daily newspaper combinations are to be considered as egregious if one party owns, operates or controls the only daily newspaper published in a community as well as the only television station that places a city-grade signal over that community or the only radio station(s) that place such a signal over the entire community. In effect, these are considered to be monopoly situations in each medium, with a newspaper monopoly being said to exist if no other daily newspaper is published in the community, a television monopoly being said to exist if no other city-grade television signal encompasses the community and a radio monopoly being said to exist if no other city-grade radio signal encompasses the community.[4] Encompassment by a city-grade signal from a competing station, obviates the need for divestiture, but for this purpose only commercial stations are counted. Educational stations (television or radio) do not suffice nor do satellite television stations nor foreign stations nor translators, FM or television. Television semi-satellites, distinguished from satellites on the basis of the former's origination of local news and public affairs, do suffice. For the purposes of the rules, interests in being on January 1, 1975, were the ones to which the divestiture provision applied.

3. With all this in mind, we turn first to the case presented jointly by Skewes and Southern Television Corporation. Their concern is that using a January 1, 1975, date for determining what interests need to be divested could force them to divest even though the facts upon which such an outcome would be premised might change. They acknowledge that the rule applies to their Meridian, Mississippi, newspaper/television cross-interests, but they point out that there is a satellite television station there which provides a city-grade signal to the entire community. While this satellite does not now (nor did it at January 1, 1975) qualify as a second service, their expectation is that the satellite station would soon become a semi-satellite and eventually a regular station.[5] They are fearful that such a change in the media situation might not be considered by the Commission. To protect them against this possibility they requested a clarification to indicate our willingness to take such a subsequent event into account.

4. This request is fair enough, for it was not the Commission's intention to ignore subsequent events that would remove the necessity for divestiture. Rather, it was an intention to limit the divestiture rule's applicability that led to use of the January 1, 1975, date. We did not intend to extend the list of divestiture cases even if the facts changed to bring other combinations within the ambit of the divestiture standard. This could happen, for example, if a competitive station changed its facilities or transmitter site with the result that it would withdraw its city-grade contour from encompassment of the newspaper community. While it could be argued that in a technical sense this would provide a basis for adding to the divestiture list, approaching the matter this way would add a perpetual uncertainty so that licensees could never be sure the issue was ever settled. This is clearly unacceptable. On the other hand, if the facts changed sufficiently so that the

[4] However, if that community has its own separately owned television station, no divestiture need take place as to the radio station-newspaper combination.

[5] Such is the Commission's expectation too, as indicated in our recent conditional grant of the renewal applications of this satellite and its Tupelo, Mississippi, parent station.

situation ceased to be egregious, no purpose would be served by ignoring this change. Accordingly, we wish to make clear our complete readiness to consider such changes, but we warn any possibly affected parties that if events which they expect to happen do not come to pass, the divestiture requirement will nonetheless apply. In other words, we shall consider changes but shall not protect stations against an excess of confidence in expecting them to take place in time to avoid the need for divestiture.

5. The next petition is that of the ANPA, in which it argues that the Commission was without authority to adopt the rules it has adopted and that our action doing so was contrary to the public interest. As to the former point, ANPA cities cases in support of the argument that it is improper to single out a particular class as ineligible to be licensees. Moreover, it charges that we are interfering with First Amendment rights, particularly by abridging the right to publish a newspaper. It also argues that the Commission erred on the factual premise underlying the new rules when it failed to recognize that newspapers and stations speak with separate voices even if they are under common ownership. In sum, we are charged with having improperly singled out newspaper publishers as second class citizens, a step which would harm not aid the public. It also argues that if the Commission did not agree with this overall view, it should at least establish a more flexible approach to application of the prospective rules and to showings that parties might provide to obviate the need for divestiture.

6. As to the prospective rules,[6] ANPA is concerned because, as existing combinations are sold to separate owners, the public could lose the benefit of the superior service that newspaper-licensed stations now provide. It also is concerned about problems that might arise in connection with being able to obtain outside equity capital. The requirements regarding operation of the corporation that lenders might specify to protect their investment could be viewed as causing a change in *de jure* even if not *de facto* control. Since the new rules would bar such a transfer of control over newspaper/station combinations, ANPA is of the view that the rules could impede the flow of needed capital, thus damaging the operations. The only alternative we provided, obtaining a waiver, is a route ANPA says would be too slow and cumbersome to follow. ANPA argues that the prospective rules are a poor bargain, offering no real gain in diversity or otherwise. In any event, according to ANPA, the rules are not needed as the number of combinations has been dropping steadily even in the absence of rules. ANPA would have us amend the prospective rules to allow applicants proposing a new combination or transfer of an existing one to show either that such a combination would be consistent with a desire to maximize diversity or that there are other countervailing factors sufficient to justify creation or continuance of the combination. It sees such an approach as being no different from the balancing of the benefits and detriments that the Commission did in the area of divestiture.

7. ANPA asserts that in the area of divestiture, the Commission's definition of monopoly, based on city-grade encompassment, is overly

[6] Specifically, these rules bar newspaper acquisition (initially or by voluntary change in ownership) of a station if the television Grade A, AM 2 mV/m or FM 1 mV/m contour encompasses or would encompass the city in which the newspaper is published. If existing combinations are voluntarily sold, it must be to separate buyers. See §§ 73.35(a), 73.240(a), and 73.636(a) for AM, FM and TV, respectively.

technical and in fact arbitrary. ANPA objects to the Commission's decision not to include other media in arriving at the divestiture group which were described as television and radio monopoly cases. The Commission is said to have gone beyond the Supreme Court's dictum in *RCA* [7] regarding sanctions that might be called for in true monopoly situations. According to ANPA these are not monopoly situations as the affected parties could show. Merely to allow for the filing of waiver petitions is considered by ANPA to be inadequate, particularly if we do not allow more time than provided by the original August 12, 1975, deadline.[8] In addition, it wants the Commission to assure parties that arguments based on economic hardship or loss of service will be accepted as bases for waiver and that the Commission would view the entrance of a new newspaper or broadcast or cable service as sufficient to obviate the need for divestiture. Finally, it asks us to modify the statement in the *Second Report and Order* that we would not be inclined to grant waiver if it were premised on views we earlier rejected.

8. None of ANPA's major arguments are really new;[9] all were considered and rejected before and nothing it has said about these points since offers any basis to change our views. On the prospective aspect it offers nothing that refutes our earlier conclusion that more diversity would result by requiring that only non-newspaper parties may acquire broadcast interests in the area in which the newspaper is published. ANPA simply considers the gains to be smaller (or conjectural) and it would draw the balance differently, but this does not cast doubt on the subject of drawing the balance as is discussed at length in the *Second Report and Order*. That discussion need not be repeated except to say that we believe the gain in terms of diversity to be real as well as important. As to sales of existing interests, ANPA seems to be in the position of arguing that there is no need to be concerned about newspaper/broadcast combinations since through natural forces sales are taking place that reduce their numbers. Yet, it also seems to be contending that we should not require a separation at sale lest we lose a superior operator. These two positions are not consistent. Moreover, our finding of a small superiority in performance by newspaper licensees was in no way shown to be a result of the fact of owning a newspaper but rather could just as well be explained in terms of journalistic traditions and pioneering broadcast operations. In any event, we cannot assume a diminution of service would result. Moreover, looking only at the small superiority obscures the important gain in diversity which would result. We continue to believe that absent unusual circumstances, diversity is the more important point when it can be achieved without hardship or disruption. We believe that the prospective rules will do this. Newspapers as a class are not barred or subjected to discrimination. They are treated exactly in the same way a television licensee already was if it wished to obtain a radio station in its area: both are barred from doing so. As we set forth in the *Second Report and Order*, we are con-

[7] *U.S. v. RCA*, 358 U.S. 334 (1959).

[8] ANPA also requests a clarification on the January 1, 1975, date; this point has been discussed above in connection with the Skewes petition.

[9] For example, we again must reject its argument that commonly owned media provide diversity. It is unrealistic to expect the same level of diversity as would be offered if the entities were under separate ownership.

vinced that authority for the actions taken is present and that it is not violative of First Amendment protections.

9. While ANPA thinks our divestiture rules are overly technical and that they ignore the fact that the public benefits from the receipt of various other media, we do not find its arguments on this point a persuasive basis for altering these rules. What it sees as overly technical, we see as both predictable and precise. As written, the rules permit all parties to know the application of the standards so that there can be no ambiguity. This standard also is reflective of the actual media situation, although certainly not exactly. City-grade is a meaningful signal level and indicator of proximity. In addition, not all media, regardless of location, circulation or other aspects warrant being taken into account, particularly if their impact were clearly minor. ANPA offers nothing new on this point, nor does it show why mere numbers should govern regardless of the importance of the outlets. As to media, significant in themselves but geographically removed, the fact remains that outside media are just that, outside in terms of dealing with local problems, and thus a viewable television (or listenable radio) signal or the presence of a weekly news magazine cannot be the governing factor. The city-grade contour also is a concept that we have often employed in a context which although different from multiple ownership nonetheless reflected parallel thinking on the obligation of stations to serve nearby communities on a secondary basis. We continue to believe this standard enunciated in the *Ascertainment Primer* remains the appropriate standard.

10. It is not quite clear how ANPA's approach to waiver grounds differs from that of the *Second Report and Order* save for their clear desire that they be generously granted. We touched on economic hardship and possible loss of service as grounds on which to seek waiver in our earlier document and do not see a reason to make any alteration in those views which called for full consideration of either. On the matter of subsequent events that affect the need for divestiture, we agree that a new daily newspaper or station subsequently established would suffice, but we cannot take a similar view about a newly created cable system. That point like any other will be considered and given appropriate weight in evaluating a waiver request. Many cable systems do not originate nor, of course, do they carry signals of stations dealing with local issues. The signals they import are those of outside stations. The presence of cable cannot be determinative for even with origination we cannot conclude that these originations would be the equal of what a station would do. We are ready, however, to consider the specifics of any particular situation which we might be asked to consider. The necessity to judge waiver requests on their merits and without prejudgment is not underminded if we warn parties in advance that arguments which we have rejected before will not provide support for waiver.

Parties remain free to offer all pertinent argument in support of waiver and we will consider their points carefully, but what they may not do is relitigate the basic premises, as if they were presenting us with another petition for reconsideration. To give an example: though a party subject to divestiture may wish that we had used encompass-

ment by a Grade A or Grade B contour instead of city-grade to show the presence of adequate diversity, that is a point to be made in a petition for reconsideration, not waiver. Once we have decided that issue, such a point of general applicability is resolved and not open to review in a waiver petition. A waiver petition, however, would be a place for attempting to show for example that special circumstances meant that in a particular case an incoming Grade A signal should be considered sufficient. Finally, we agree that no useful purpose would be served by insisting on an August 12 filing date for petitions for waiver now that it has become clear that judicial review will not be concluded by then. Sixty days after judicial review is completed seems an appropriate date to substitute, one which should allow sufficient time to prepare the filing and would give ample time for our action before any divestiture need take place.[10]

11. The petition filed by Gray Communications notes its total disagreement with the Commission's decision but focuses its primary opposition on the Commission's statement that it was not inclined to hold evidentiary hearings on waiver requests. In Gray's view, the Commission cannot properly evaluate the information regarding particular markets on which the grant of waiver would turn unless the affected licensee were afforded a hearing to offer these facts. Emphasizing court holdings which recognize a legitimate interest by broadcasters in having a security of tenure and in being able to obtain a preference for superior service, Gray asserts that both goals are being undermined by what it sees as a retroactive application of what is alleged to be a prospective rule. Even though it recognizes that court cases have held that rules (even if a license is modified in the process) can be put into effect without holding a prior evidentiary hearing, it argues that here the facts about the local situation are peculiarly within the knowledge of the licensee and hence a waiver hearing is necessary so they might be adduced. It also objects to our stated refusal when dealing with waiver requests to relitigate issues previously resolved.

12. As to the final point, it must be rejected on the same basis as was the essentially similar argument of the ANPA. Likewise, the contention that waiver hearings are a necessity before divestiture could take place seems to rest on several misunderstandings. First, it has been long established that the Commission is able to modify a class of licenses during their terms by way of rule making actions.[11] Moreover, where individual modifications were involved, the Commission simply postponed the effective date until the current license term had expired, and on this basis there is no license modification during its term as the rule's application is deferred until much later, namely, January 1, 1980. Thus the § 316 requirement for an evidentiary hearing does not apply. As to the consideration of the facts regarding the particular local situation, the Commission does not need to hold a hearing under ordinary circumstances. This is particularly the case where it is not the facts that are in dispute but their legal significance. If

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[10] KCMC, Inc., licensee of Station KTAL–TV, Texarkana, Texas, and co-owned with the only daily newspaper there has sought a declaratory ruling that it was incorrectly listed for divestiture. Pending action on that petition it has moved for an extension of time for filing a petition for waiver of § 73.636(c) to 120 days after the date on which the Commission releases an order disposing of the petition. Whether such an extension may later prove necessary cannot be determined now, so we shall grant the motion to the extent already specified for all other parties.

[11] See *e.g. WBEN* v. *FCC*, 396 F. 2d 601 (2d Cir. 1968) *Cert. den.* 393 U.S. 914 (1968).

there are disputed facts and a hearing is necessary to resolve them, the Commission can hold such a hearing but such is not the norm, nor is it expected to be here. If the issues posed by the waiver petitions do not bear out the Commission's expectations, it can easily alter its procedures should fairness or other reasons so dictate.

13. We now turn to the only petition which would broaden the category of divestiture cases. Radio Stamford argues in its petition that the Commission should not have exempted the Stamford, Connecticut, Stations WSTC(AM) and WYRS(FM) which are the only ones licensed to the community and are owned in common with the only local daily newspaper. According to Radio Stamford, the only other city-grade signals that encompass Stamford are two clear channel AM stations in New York City, which it insists do not offer a locally oriented service to Stamford so as to provide a reasonable basis for concluding that there is real diversity there. To remedy this it would change the rule to not take into account an incoming city-grade signal if it originates in a separate SMSA. This, it argues, better coincides with the reasonable expectation regarding what needs a station will endeavor to service. The licensee has opposed this with a lengthy engineering showing of the primary coverage available to Stamford and vicinity. It also charges Radio Stamford with a failure to participate earlier, something it sees as a fatal defect if the arguments are offered for the first time in a petition for reconsideration. It also questions Radio Stamford's standing, alleging that as a mere applicant it is not a party aggrieved. On the merits, we are asked to affirm our action which adopted standards that exempted Stamford.

14. We do not intend to rely on any alleged procedural deficiency in acting on this petition because we think it a matter we should reach on the merits. The petition requires denial because it rests on a fallacy and a misunderstanding. The fallacy is that our decision was based on a conclusion that the outside stations which encompass the newspaper community are operating in a manner to serve its needs. The misunderstanding is that if they do not already do so we did not intend a change in this situation. Neither is accurate. We recognized that some of the outside stations which encompass the newspaper communities were already serving the needs of these communities, but we also knew that a number of others were not doing so. Therefore, we stated in footnote 36 of the *Second Report and Order* that such stations would need to undertake this effort and direct themselves to these needs on a secondary basis. In this particular case the obligation is one to be shared by the two stations and discharged in a manner they think best conducive to our goal. We have been shown no reason to think this approach is any more unworkable or inappropriate here than elsewhere. On the other hand, having a rule which would be dependent on the vagaries of changing SMSA definitions and station location would not promote fairness but it would introduce difficulties in administration. Finally, we have a problem with any suggested alternative which is geared to deal with a particular situation, as appears to be the case here, rather than the general situation. This is neither necessary nor wise, and we shall reject it.

15. We now come to the very extensive filing by The Brockway Company, publisher of the only daily newspaper at Watertown, New York, and the licensee of the only full-fledged American commercial

television station that provides Watertown with a city-grade signal. Brockway contends that the Commission erred in refusing to consider encompassment by educational television stations and for this and other reasons considers the standards employed by the Commission to be unrealistic. It also objects to the Commission's action on its own motion exempting a television station at Hickory, North Carolina, and a radio station at Brookfield, Missouri, from the impact of the rules. Brockway asserts that if the Commission thinks it proper to evaluate qualitative matters as it did in those two cases and thereby extend its inquiry beyond a simple examination of city-grade contours, then it needs to do so for Brockway's situation as well and recognize the inappropriateness of divestiture. According to Brockway, there is significant attention to the affairs of Watertown that is provided by media not counted under the Commission's test and it urges the Commission to examine the situation so that these points can be taken into account.

16. Although Brockway has offered a large amount of information regarding its own situation, much of this is material better directed to obtaining waiver. To take one example: if Brockway's argument were that educational stations as a group provided sufficient news and public affairs to be counted as a commercial station would be, that is a matter which is appropriate for resolution here. On the other hand, if the argument is based on the programming of the particular station that encompasses Watertown with a city-grade signal, it is a quite different matter, one far more suitable to consideration in connection with a waiver request. The reason is simple to understand; without a showing that this is the typical case, it is impossible to rely on this information to show the general situation, and it is just this norm which is the suitable basis for rule making and what differentiates it from *ad hoc* adjudications. While much of the information and argument may not be suitably considered now, Brockway is entitled to have it considered on the merits. To simplify matters it may incorporate the present pleadings by reference in any supplementary material it files seeking waiver. The general issues, of course, will be resolved here.

17. We do not agree with Brockway that on an across-the-board basis educational and commercial stations can or should be considered as equivalent for the purposes of these rules. That the Commission is considering imposing formal ascertainment requirements on educational stations is not the point. Nor is there any dispute about the observation in the ascertainment *Notice* that educational stations have always had the duty to determine local needs and respond to them. Although, the general obligation of serving the public interest accompanies any broadcast license, for this fact to be meaningful here, it would be necessary for the response to this obligation to take such a form as would demonstrate adequate diversity. No requirement governing the nature of the programming effort of an educational station exists, and formalizing the ascertainment process would not change this fact. Specifically, in view of the extremely high costs involved, there is very little news gathering on the local scene by educational stations. Even if they present news and public affairs of a non-local nature this is not demonstrative of diversity on local issues. This lack of local orientation was the reason for our action refusing to take into account commercial signals of less than city-grade. Brockway states that there is no mini-

mum specified in the time a commercial station devotes to news or public affairs, but this fact does not obscure a recognition of the situation as it exists. Moreover, if the implication of Brockway's argument were true, it would cast doubt on automatically exempting combinations if an outside commercial station encompassed the newspaper community. This would be the result of our not being able to rely on the fact that these stations offer news and public affairs, and under this test, encompassment would be irrelevant unless we found a significant programming response in local news and public affairs. This method of proceeding was implicitly rejected in the *Second Report and Order* because we did not want to enter a thicket of qualitative judgments, based on the performance of stations on an individual basis. Nonetheless, when it comes to waiver rather than the establishment of general rules, the particular efforts of the educational station in Brockway's area could be considered for whatever weight they deserve. Since we cannot simply equate educational and commercial stations, changing the rules on such a premise must be rejected.

18. Brockway charges it is arbitrary to include its interests on the list for divestiture even though there are three other city-grade signals available (one translator, one educational and one Canadian) and it has a program-originating cable system and receives two Grade B television signals from Syracuse stations. This it contrasts with the Columbus, Mississippi, situation where no divestiture was required because a Tupelo, Mississippi, station provides a city-grade signal, the only other one the residents of that city receive. It asserts that its own situation is much different with much more diversity being offered by media not present in the other case. It also asserts that the Tupelo station does not address the needs of Columbus. The trouble with this argument is that Brockway in effect is asking us to hold on a general basis that several apples (translators, Grade A or B signals, etc.) count as much or more than one orange (a city-grade signal). The rule specifies the latter and not the former because one city-grade signal if it encompassed was thought to suffice and the other media were not thought to have enough impact or directed themselves to local issues and we continue to believe this.

19. Just as with educational stations, we were not prepared to accept translators or foreign stations as sufficient to demonstrate diversity. A translator is nothing more than a low power station which functions as a mechanism for extending the range of a distant station, which by virtue of its separation does not respond to the needs of the newspaper community. Realistically it could not be required to do so. This is not to say that the choice of entertainment and other programs which translator stations help make possible is not important; it is. In fact, on national or state issues they can offer material which is important in providing diversity, but this does not extend to the area of local news and issues, and this is the vital concern with which we were dealing. A foreign station ordinarily would not do so either, and as we observed before, even if it did, there is no certainty that it would continue doing so or a way this Commission could act to insure that it would. Finally, there is the presence of a cable system, but here, too, even with origination, the system could not be considered the equal of a station providing a city-grade signal. Any argument that a particular system offers such diversity on a par with a city-grade signal, belongs in a waiver context,

not here. Nor do all systems have the percentage of subscribers that the Watertown system does, nor does it typify the industry in terms of local origination. Thus, while the special facts may be considered in connection with a waiver request, we cannot use them to formulate a revision of a rule of general applicability.

20. Finally, Brockway would have us re-write the rules to include consideration of smaller local media and media from outside the city of Watertown, since in its view theirs is not a "local" market as such but one containing several counties in its primary area. Under their system, Grade A and Grade B signals would also be included and so would the cumulative impact of weekly newspapers. This, however, is not dispositive on the matter of our primary concern, that of local diversity. Outside media ordinarily cannot be expected to give much attention to local affairs and the smaller local media would ordinarily not be expected to have a large impact. Brockway is free to pursue its argument that its case is unusual in this regard and seek waiver on this basis. Also, while the advertising market may resemble the picture Brockway offers, this does not connect with the principal concern, that of diversity.[12] To the extent that these or any other matters demonstrate that the situation in a particular area so differs from the norm as to arguably support waiver on that basis, parties are free to so allege. When, as in Hickory and Brookfield, the facts are clear at first blush, we need not wait for a petition. Reconsideration, however, must be denied.[13]

21. The previous discussion has dealt with all the petitions for reconsideration properly before us.[14] There is another pleading entitled petition for reconsideration, but this filing, by the Findlay Publishing Company, does not seek reconsideration of the rules we adopted as such. Rather, it seeks to have the divestiture requirement which was applied to it lifted on the basis of encompassment of the community by another city-grade signal. Because of this fact the petition will be acted upon separately when the review and analysis of the engineering data it submitted is completed.

22. Although it was not mentioned by any of the parties, there is one additional aspect to consider. In Sections 73.35(c), 73.240(c), and 73.636(c), we used the phrase "place(s) a city-grade signal over the community" to express the concept that the city-grade signal was the indicator of diversity in connection with possible divestiture. However, when it came to the prospective part of the new rules, the word "encompassing" was used instead. Since the same concept—inclusion of the entire community inside the city-grade contour—is involved, it is appropriate to make the editorial change of conforming the language to use encompassing throughout. Sections 73.35(c), 73.240(c), and 73.636(c) will be changed accordingly. Section 73.35(c) and 73.240(c) will also be changed to reflect an editorial correction.

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[12] When it comes to soliciting advertising, it does not seem that the outside media would be able to compete effectively or that the weekly newspapers would have much of an impact.

[13] A motion was filed by the National Citizens Committee for Broadcasting seeking expedited consideration of the petitions on which we are now acting. While we are not acting quite as speedily as it would have liked, the action is nonetheless quite prompt and in effect grants the relief requested.

[14] On May 2, 1975, the Nebraska Broadcasters Association, Inc. filed "Comments" but this filing is untimely even if intended as a petition for reconsideration and it need not be considered.

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23. Accordingly, IT IS ORDERED, That the relief requested in the subject petitions IS GRANTED to the extent indicated and in all other respects IS DENIED.

24. IT IS FURTHER ORDERED that the Comments filed by the Nebraska Broadcasters Association, Inc. ARE DISMISSED.

25. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended, Sections 73.35(c), 73.240(c) and 73.636(c) ARE AMENDED as set forth in the attached Appendix effective July 11, 1975.

26. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

1. Section 73.35(c) is amended to read as follows:

§73.35 MULTIPLE OWNERSHIP.

* * * * * * *

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for AM, predicted for FM). The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

* * * * * * *

2. Section 73.240(c) is amended to read as follows:

§73.240 MULTIPLE OWNERSHIP.

* * * * * * *

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for AM, predicted for FM). The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

* * * * * * *

3. Section 73.636(c) is amended to read as follows:

* * * * * * *

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial television station encompassing the entire community with a city-grade signal. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980.

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Appendix D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1064 Term, 1976

National Citizens Committee for Broadcasting, Petitioner

v.

Federal Communications Commission and United States of America

75-1152

Owosso Broadcasting Company, Inc., Petitioner

v.

United States of America and Federal Communications Commission

75-1280

National Association of Broadcasters, Petitioner

v.

Federal Communications Commission and United States of America

75-1379

WEAO, Inc., Petitioner

v.

United States of America and Federal Communications Commission

75-1386

The Ogden Newspapers, Inc., Petitioner

v.

United States of America and Federal Communications Commission

75-1387

Daily Telegraph Printing Company, Petitioner

v.

United States of America and Federal Communications Commission

75-1388

The Ogden Newspapers, Inc., Petitioner

v.

United States of America and Federal Communications Commission

75-1567

American Newspaper Publishers Association, Petitioner

v.

Federal Communications Commission and United States of America

75-1614

The Brockway Company, Petitioner

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1618 -2- Term, 19 76

Gray Communications Systems, Inc., Petitioner

v.

Federal Communications Commission and United States of America

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: BAZELON, Chief Judge, WRIGHT and ROBINSON, Circuit Judges

JUDGMENT

These causes came on to be heard on petitions for review of an order of the Federal Communications Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the rule - making order under review herein is affirmed only insofar as it operates prospectively; those portions of said order that have a retroactive effect and those portions dealing with existing combinations are vacated; and the record is remanded to the Commission for adoption of rules not inconsistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court
George A. Fisher
George A. Fisher
Clerk

Date: March 1, 1977
Opinion for the Court filed by Chief Judge Bazelon.

Appendix E

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1064

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

ELYRIA-LORAIN BROADCASTING CO., *et al.*, INTERVENORS

No. 75-1152

OWOSSO BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1289

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1379

WJAG, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WHAS, INC., *et al.*, INTERVENORS

No. 75-1386

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1387

DAILY TELEGRAPH PRINTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WHAS, INC., *et al.*, INTERVENORS

No. 75-1388

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1567

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1614

THE BROCKWAY COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1618

GRAY COMMUNICATIONS SYSTEMS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

On Motion for Stay of Mandate

Filed April 5, 1977

Judgment entered this date

Before BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

PER CURIAM: Before us is a motion filed by the Federal Communications Commission to stay the mandate to be issued by this court pursuant to its opinion and order on the merits of this case. The Commission suggests that immediate compliance with portions of our mandate would impose a "substantial burden" on its resources. Since the Commission is moving quickly to petition the Supreme Court for a writ of certiorari in this case, it asserts that such a burden ought not be required until the Supreme Court can act on its petition. The National Association of Broadcasters (NAB) supports the Commission's motion, arguing that immediate issuance of our mandate will require NAB's members to begin costly efforts leading to divestiture. The Department of Justice does not oppose the motion, but does not actively support it either. The National Citizens Committee for Broadcasing (NCCB) opposes the motion insofar as it would reinstate the requirement that petitioners to deny individual license renewal applications allege a Sherman Act section 2 violation as a precondition for a hearing on the question of undue economic concentration. NCCB would also have us stay that part of our order which vacates Commission orders requiring divestiture in 16 so-called "egregious" cases. It is not clear, however, that NCCB or anyone else will seek further review of this segment of our opinion.

Before ruling on these motions, it is important to review the salient points of our March 1 opinion. By its order in the cross-ownership case, the Commission divided its regulatory province into three parts. New broadcast licenses would not be issued to any applicant which also owned a newspaper co-located with the proposed broadcast station's area of license. Present co-located newspaper-broadcast combinations, with 16 exceptions, were grandfathered and, in addition, the Commission took the view that further challenges to the renewal of these stations' licenses would have to meet tougher threshold requirements. Divestiture was ordered only where the sole broadcast station in a locality was owned by the sole daily newspaper in the same locality.

The gist of our opinion is that the lines thus drawn between future and present co-located combinations and between the 16 egregious cases and all other present co-located combinations were arbitrary and capricious. We first indicated that the Commission had authority to promulgate its prospective rules even though the record was inconclusive on the question whether actual "abuses" flowed from newspaper-broadcast cross-ownership. We agreed with the Commission that long-established principles indicated that it could act to increase the diversity of broadcast media voices even when there was no evidence that a lack of diversity was producing harmful side effects. We recognized that the Commission had consistently acted on this principle and had received the approval of the courts (including the Supreme Court on a number of occasions) for this policy approach. Indeed, in its instant motion, the Commission has not asked us to stay our mandate insofar as it approves the prospective cross-ownership rules. Thus now as in its defense on the merits, the Commission apparently asserts its authority and intention to act to increase diversity even though it has created no record of actual abuses stemming from cross-ownership.

Having asserted its authority and intention to act in this way with respect to applications for new licenses, however, the Commission insisted that it was required to find actual evidence of abuses before it could order divestiture of presently co-located facilities. The Commission itself recognized that such a shift of position had to be justified by reference to factors differentiating pres-

ent from future licensees. One factor suggested was harm to the public interest in terms of a reduction in the quality of broadcast programming, but the Commission correctly found no record support for any such proposition. The Commission did assert policies competing with enhancement of diversity as support for its shift of emphasis, but on analysis we found that in the past these policies had consistently been given lesser weight than increased diversity and further that these policies if consistently applied in the future would require massive shifts in the practice of the Commission with respect to license transfers. We further found that the distinct treatment of the 16 egregious cases was invalid under the Commisison's announced divestiture rule since the record contained no evidence that justified their disparate treatment.

Thus, "[h]aving evaluated the policies and record presented to us, we [held] that the Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture." Slip op. at 50. In summarizing this holding, we said, "The Commission has sought to limit divestiture to cases where the evidence clearly discloses that cross-ownership harms the public interest." *Id.* at 60. And, we continued:

> For the reasons expressed above, we believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.

This final sentence is part of the summary of our holding that the retroactive rules are invalid, and its purpose was to indicate that the presumption upon which the Commission acted rendered the divestiture rule invalid. Nothing in our opinion supports a contrary conclusion.

Thus we were faced with a situation in which the Commission had treated three indistinguishable groups very differently. Because of this, steps had to be taken to restore consistent administrative treatment. Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules, and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt, but which it had already indicated would be available with respect to the egregious 16).

Against this background, it should be plain that staying our mandate in this case would, *pro tanto*, sanction inconsistent treatment of licensees. On the other hand, the Commission warrants that it wishes to file for review of our decision as quickly as possible, but that absent a stay it will incur substantial burdens, which could conceivably impede that effort. On consideration of these competing factors, we are persuaded to stay our mandate, only insofar as it applies to the Commission's grandfathering rules, until April 22, 1977, on the understanding that the Commission will have filed for certiorari by that date.

So ordered.

Appendix F

Communications Act of 1934, 48 Stat. 1064, as amended, 48 U.S.C. 151 et seq.

§ 152. Application of chapter.

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

§ 154. Federal Communications Commission.

* * * * *

(i) Duties and powers.

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings.

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

§ 301. License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

§ 303. Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest[.]

§ 309. Application for license.

(a) Considerations in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(d) Petition to deny application; time; contents; reply; findings.

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

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IN THE

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OCTOBER TERM, 1976

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*.

JOINT STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Come now Belo Broadcasting Corporation, The Hearst Corporation, Scripps-Howard Broadcasting Company and The E. W. Scripps Company, respondents herein, and, by their attorneys, submit the following joint statement:

Belo Broadcasting Corporation is the licensee of standard, FM, and television broadcast stations. A. H. Belo Corporation, the beneficial owner of Belo Broadcasting Corporation, is the publisher of daily news-

papers. Some of the broadcast stations licensed to Belo Broadcasting Corporation and the newspapers published by the A. H. Belo Corporation are "co-located."

Scripps-Howard Broadcasting Company is the licensee of standard, FM, and television broadcast stations. The E. W. Scripps Company, the majority stockholder of Scripps-Howard Broadcasting Company, has ownership interests in daily newspapers, some of which are "co-located" with the broadcast stations.

The Hearst Corporation is the licensee of standard, FM, and television broadcast stations, and the publisher of daily newspapers, some of them "co-located."

Each of the respondents was a party to the rulemaking proceeding before the Federal Communications Commission, which proceeding culminated in the *Second Report and Order,* 50 FCC 2d 1046, on reconsideration, 53 FCC 2d 589 (reproduced in the Federal Communications Commission's Appendix to its Petition for Writ of Certiorari, No. 76-1471, at pp. 61-158). Each was an intervenor in the proceeding to review the *Second Report and Order* in the United States Court of Appeals for the District of Columbia Circuit. A panel of that court vacated a portion of the Federal Communications Commission's *Second Report and Order* and remanded the record for adoption of a rule in conformity with the court's opinion. *National Citizens Committee for Broadcasting, et al.* v. *Federal Communications Commission and United States of America, et al.,* No. 75-1064 (FCC App. 1-60). Simply stated, the court below reversed that portion of the FCC's *Second Report and Order* which declined, except in "egregious" cases, to ban cross-ownership of existing co-located broadcast stations and daily newspapers. Under the

court's decision below, respondents would be adversely affected.

Respondents support the Petition for Writ of Certiorari filed April 22, 1977, by the Federal Communications Commission and, for the reasons expressed therein, respectfully urge this Court to issue such Writ.

Respectfully submitted,

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BRIEF AMICUS CURIAE

IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. FILED ON BEHALF OF DISPATCH PRINTING COMPANY.

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
INTEREST OF AMICUS CURIAE	2
ARGUMENT	4
I. The Congress has assigned the determination of "public convenience, interest and necessity" to the Commission and not to the courts	6
II. The Commission's determination that its new rule should not be applied retroactively in cases where one or more other media voices were available in a community can not reasonably be said to be "irrational"	15
CONCLUSION	22

TABLE OF AUTHORITIES

Cases:

Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944)	18
Associated Press v. *United States*, 326 U.S. 1 (1945)	6
Balts v. *Balts*, 273 Minn. 419, 142 N.W. 2d 66 (1966)	21
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974)	10, 14
Buckeye Cablevision Inc. v. *Federal Communications Commission*, 387 F.2d 220 (D.C. Cir. 1967)	16
Burns v. *Owens*, 459 S.W. 2d 303 (Mo. 1970)	21
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	10, 12
Claridge Apartments Co. v. *Comm'r.*, 323 U.S. 141 (1974)	19
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1972)	4, 12
Columbus Broadcasting Coalition v. *Federal Communications Commission*, 505 F.2d 320 (D.C. Cir. 1974)	16
Committee for Open Media v. *Federal Communications Commission*, 533 F.2d 1 (D.C. Cir. 1976)	16
Dawson v. *Olsen*, 94 Idaho 636, 496 P. 2d 97 (1972)	20

Page

Escobedo v. *Illinois*, 378 U.S. 478 (1964) 20
Ethyl Corp. v. *Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir.) *cert. denied*, 426 U.S. 941 (1976) 10
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 13, 14
Federal Communications Commission v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) 12
Federal Communications Commission v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940) 11
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17 (1952) 13, 14
Fountain v. *Fountain*, 214 Va. 347, 200 S.E. 2d 513 (1973), *cert. denied*, 416 U.S. 939, *rehearing denied*, 417 U.S. 927 (1974) 21
General Telephone Company of the Southwest v. *United States*, 449 F. 2d 846 (5th Cir. 1971) 17
Gilbert v. *California*, 388 U.S. 263 (1967) 20
Goller v. *White*, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963) 21
Griffin v. *California*, 380 U.S. 609 (1965) 20
Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) 19
Greater Boston Television Corp. v. *Federal Communications Commission*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied sub nom. WHDH Inc.* v. *Federal Communications Commission*, 403 U.S. 923, *rehearing denied*, 404 U.S. 877 (1971) 9, 11
Hassett v. *Welch*, 303 U.S. 303 (1938) 19
James v. *United States*, 366 U.S. 213 (1961) 19
Jefferson Standard Broadcasting Co. v. *Federal Communications Commission*, 297 F. Supp. 784 (W. D. N. C. 1969) 17
Johnson v. *New Jersey*, 384 U.S. 719 (1966) 20
Kojis v. *Doctors Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 131, *modified on rehearing*, 107 N.W. 2d 193 (1963) 21
Langdell v. *Dodge*, 100 N.H. 118, 122 A.2d 529 (1956) 21
Linkletter v. *Walker*, 381 U.S. 618 (1965) 19, 21
Mapp v. *Ohio*, 367 U.S. 643 (1961) 19
Marks v. *United States*, decided March 1, 1977 20
McClatchy Broadcasting Co. v. *Federal Communications Commission*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) 8, 11

Page

Miller v. *California*, 413 U.S. 15 (1974) 20
Miranda v. *Arizona*, 384 U.S. 436 (1966) 20
Molitor v. *Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959) 20
Mt. Mansfield Television, Inc. v. *Federal Communications Commission*, 442 F.2d 470 (2d Cir. 1970) ... 7
National Association of Independent Television Producers and Distributors v. *Federal Communications Commission*, 516 F.2d 526 (2d Cir. 1975) ... 14
National Broadcasting Co., Inc. v. *Federal Communications Commission*, 516 F.2d 1101 (D.C. 1975), *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co., Inc.*, 424 U.S. 910 (1976) 14, 16
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 10, 15, 16
Niagara Mohawk Power Corp. v. *Federal Power Commission*, 379 F.2d 153 (D.C. Cir. 1967) 17
NLRB v. *E&B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960) 19
Parker v. *Port Huron Hospital*, 361 Mich. 1, 105 N.W. 2d 1 (1960) 21
Public Interest Research Group v. *Federal Communications Commission*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) 12
Red Lion Broadcasting Co., Inc. v. *Federal Communications Commission*, 395 U.S. 367 (1969) ... 4, 6, 10, 11
Retail, Wholesale and Dept. Store Union v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972) 19
Schwartz v. *U.S. Rubber Corp.*, 112 N.J. Super. 595, 272 A.2d 310 (1971) 21
Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 (1946) 9, 12, 17, 18
Stovall v. *Denno*, 388 U.S. 293 (1967) 20
Tehan v. *United States ex. rel. Shott*, 382 U.S. 406 (1966) 20
The Permian Basin Rate Cases, 390 U.S. 747 (1968) .. 12
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) 7
United States v. *Maher*, 307 U.S. 148 (1939) 19
United States v. *McDaniel*, 7 Peters 1 (1833) 18
United States v. *Saskatchewan Minerals*, 385 U.S. 94 (1966) 13

Page

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 16
United States v. *Sullivan*, 332 U.S. 689 (1948) 18
United States v. *Wade*, 388 U.S. 218 (1967) 20
Vickers v. *Vickers*, 109 N.H. 169, 242 A.2d 57 (1968)... 21

Statutes and Regulations:

5 U.S.C. § 706(2)(A), (E) 10
28 U.S.C. 1254(1) 2
29 U.S.C. § 261 18
47 C.F.R. § 73.188 2
47 U.S.C. § 301 *et seq.* 6
47 C.F.R. § 73.315 2
47 C.F.R. § 73.685 2

Miscellaneous:

Cable Television Report and Order, 36 F.C.C.2d 143 (1972) 15
Comment Note, 10 A.L.R. 3d 1371 (1966) 21
K. Davis, ADMINISTRATIVE LAW TREATISE, § 5.09, p. 532 (1958) 18
Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725 (1966) 15
Hearings on Applications for Second VHF Station, 3 P & F Radio Reg. 2d 909 (1964) 16
Interim Policy on Television Multiple Ownership, 5 P & F Radio Reg. 2d 271 (1965) 16
Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964) 16
Multiple Ownership of Standard, FM, and Television Broadcast Stations, 22 F.C.C.2d 306 (1970).... 16, 17
Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046 (1975) 1

Page

Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 53 F.C.C.2d 589 (1975) 1
Multiple Ownership of Television Broadcast Stations, 12 P & F Radio Reg. 2d 1501 (1968) 16
Revision of FM Broadcast Rules, 23 P & F Radio Reg. 1801 (1962) 15
Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L.REV. 632 (1967) 19
Supreme Court Rule 42(1) 3

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BRIEF AMICUS CURIAE

IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED ON BEHALF OF DISPATCH PRINTING COMPANY.

OPINIONS BELOW

The opinion of the court of appeals (FCC App. A,[1] pp. 1-60) has not yet been reported. The Orders of the Federal Communications Commission (FCC App. B and C, pp. 61-158) are reported at 50 FCC 2d 1046 (1974) and 53 FCC 2d 589 (1975), respectively.

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[1] Amicus references to appendices are to those contained in the Appendix filed by the Federal Communications Commission to its petition for a writ of certiorari.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1977. (FCC App. D, p. 160.) The court of appeals granted a partial stay of its mandate on April 5, 1977 (FCC App. E, pp. 161-167). The Federal Communications Commission (hereinafter "the Commission") filed a petition for a writ of certiorari on April 22, 1977. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTEREST OF AMICUS CURIAE

The Dispatch Printing Company ("Dispatch") publishes *The Columbus Dispatch*, an independent daily evening newspaper, and *The Columbus Sunday Dispatch*, a Sunday newspaper, in Columbus, Ohio.[2] Dispatch owns all the stock of WBNS-TV Inc., licensee of WBNS-TV, Channel 10, in Columbus since 1951.[3] Dispatch shareholders also own RadiOhio, Inc. licensee of radio stations WBNS(AM) and WBNS-FM, Columbus, since 1934 and 1957, respectively.

After a seven year rulemaking proceeding, the Federal Communications Commission adopted rules forbidding the prospective formation of combinations of a newspaper and a broadcast station (radio or television) located in the same community,[4] but making the

[2] The *Dispatch* competes with a daily morning newspaper, *The Columbus Citizen-Journal*, published by the E. W. Scripps Company.

[3] Dispatch also owns WTHR(TV) in Indianapolis, Indiana.

[4] That is, ownership of a newspaper located within the city grade signal, *i.e.* primary service area of a commonly owned broadcast station. *See* 47 C.F.R. § 73.685, 73.315, 73.188. For ease of reference, such co-location is referred to herein as "in the same community."

rule not retroactive with respect to existing co-located combinations except in communities served by only one daily newspaper and one broadcast station.

In the case of one newspaper-one broadcast station communities, the Commission Order required one of the interests to be divested within five years. The court of appeals upheld the prospective portion of the rules (FCC App. A, p. 33), but invalidated the Commission's determination not to apply the cross-ownership rule retroactively. (FCC App. A, p. 60.)[5]

This decision, if upheld, would affect Dispatch substantially and adversely, by forcing it to divest either its newspaper or its broadcast stations in Columbus, unless it could make a showing of "special circumstances." (FCC App. A, p. 60.) The Commission rule invalidated by the court of appeals would have permitted Dispatch to retain its Columbus newspaper and broadcast stations, so long as the stations continue to serve the public interest.

Dispatch has obtained written consent of all the parties below to the filing of this brief as amicus curiae pursuant to Rule 42(1) of the Rules of this Court.[6]

[5] WBNS-TV participated in the Federal Communications Commission rulemaking proceeding, but was not an intervenor in the court below.

[6] Amicus also supports the petition for a writ of certiorari (No. 76-1521) filed May 2, 1977 on behalf of Channel Two Television Company, The Houston Post Company, Chronicle Broadcasting Company, KSL, Incorporated (Deseret News), Post-Newsweek Stations, Capital Area, Inc., The Washington Post Company, WHAS, Inc. (The Courier Journal and The Louisville Times).

ARGUMENT

This case involves an important question of public policy. If the decision below stands, patterns of ownership of newspapers and television-radio stations, which have served the public well for many years, will be transformed, without any action by Congress, and contrary to the judgment of the agency to which Congress has delegated the formulation of policy in this area. Such a massive change of policy, if it is to be done by the courts, should be imposed only after full plenary review by this Court.

In considering this case, it should be emphasized that it does not involve an ordinary controversy between two television stations, or a dispute between a single television station and the Federal Communications Commission. On the contrary, this is a rulemaking proceeding, where the Commission is engaged in what is clearly delegated legislative action. The court below has not decided that the Commission *cannot make* a particular rule because that rule would violate the law (as was unsuccessfully contended in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission,* 395 U.S. 367 (1969), for example). What the court below has done is to *command* the Commission to make a particular rule chosen by the court. That is essentially legislative action. No case is known where the courts have mandated such action. (This Court refused to order the *adoption* of a legislative rule in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1972).) The issue whether such a drastic step, involving serious questions of the separation of powers, should be taken by the courts, presents a question of great public and

constitutional importance which should be reviewed by this Court.

The petitions filed in this case present a number of issues, which will not all be restated or reviewed here. The argument in this brief will focus on two questions which appear to be particularly relevant in assessing the significance of the decision below:

1. Does the decision of the court of appeals improperly usurp the function allocated by Congress to the Federal Communications Commission, in view of the fact that Congress assigned to the Commission, and not to the courts, the responsibility to determine the "public interest, convenience and necessity" in making broadcast licensing decisions and regulations?

2. Was the Commission acting within its delegated powers when it held that a change of its rules and practices with respect to cross-ownership of newspapers and broadcast facilities should be applied prospectively only, under all the circumstances, which it carefully reviewed, except in situations where a community had only a single newspaper and a single broadcast facility, and they were under single ownership?

The essence of the decision of the court of appeals—which cannot be escaped by quibbling about its wording, in various places, including a supplemental opinion on stay—is that it is "irrational" to make a distinction as to existing co-ownerships in multiple facility communities. That is something of a *tour de force,* which merits evaluation by this Court.

I.

The Congress Has Assigned the Determination of "Public Convenience, Interest and Necessity" to the Commission and Not to the Courts.

The Commission determined in making a rule that departed from prior practice that the public interest would be advanced by prohibiting future combinations of daily newspaper and broadcast stations in the same community, and breaking up within five years of such combinations in a community where there was no other media voice, but not the elimination of existing combinations in communities with other media outlets (FCC App. B, pp. 90-91).[7] The court of appeals, however, decided that "the Commission could not have rationally concluded that the competing policies it offered justified grandfathering absent a showing of harm" (FCC App. A, p. 56) and therefore, that "divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest."[8] (FCC App. A, p. 60.) Lest there

[7] There is no disagreement between the Commission and the courts that the First Amendment objectives of preserving "an uninhibited marketplace of ideas in which truth will ultimately prevail . . .", *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367, 390 (1969), and fostering "the widest possible dissemination of information from diverse and antagonistic sources . . . ," *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), are essential to the public interest. What is at issue in this case is (1) the weight to be assigned to these objectives and (2) who is to assign it under the public interest provisions of the Communications Act of 1934, as amended, 47 U.S.C. § 303, 303(r), 307, 309(a)(d)(h), 310 and 312.

[8] In basing this conclusion on its interpretation of the record evidence, the court of appeals appears to have forgotten this Court's requirement for proper judicial review:

"We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported."

United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972). It is not a reviewing court's "function to weigh the evidence in support of these various points of view. [A court] should not, and indeed cannot, substitute its judgment for that of the Commission." *Mt. Mansfield Television, Inc.* v. *Federal Communications Commission*, 442 F.2d 470, 482 (2d Cir. 1971). Estimates and forecasts are the Commission's proper function. *Ibid* at 483.

be any doubt that divestiture was compelled, the court said in granting a stay of its mandate (FCC App. E, p. 167):

> "Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules [prohibition of cross-ownership], and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone [prospective cross-owners; existing cross-owners in one station, one newspaper communities; and all other existing cross-owners] would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt. . . .)."

The court's opinion leaves to the Commission authority to weigh competing public interest licensing considerations only in those instances where cross-ownership is not involved. Where cross-ownership exists, the court directs the Commission to withhold a license, in the absence of a showing that the cross-

ownership itself is in the public interest so strong as to rebut the "presumption . . . compelled" against it. (FCC App. A, p. 60.)[9]

Given the common assumptions of the Commission and the court that, within the inherent limits of the broadcast frequencies, an uninhibited marketplace for ideas and dissemination of information from diverse sources are essential ingredients of the public interest, the holding of the court of appeals is, in substance, simply a disagreement with the Commission's judgment on how best to achieve that goal. The court demands total divestiture now. The Commission, by permitting existing cross-ownerships, which it authorized through licensing, has opted for an evolutionary reduction of cross-ownership through conventional marketplace newspaper and broadcast station sales and exchanges.[10]

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[9] In a prior decision, the court of appeals held, in regard to competing license applications, that the Commission was entitled to consider diversification of control "in connection with all other relevant factors and to attach such significance to it as its judgment dictates." *McClatchy Broadcasting Co.* v. *Federal Communications Commission*, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957). In this case, the court has veered sharply from its view in *McClatchy* that the Commission should regard diversity as one of a number of public interest factors, and reversed its view that diversity is a factor to be weighed by the Commission in the exercise of its judgment and expertise.

[10] The inherent scarcity of the broadcast spectrum may require the exercise of judgment by the Commission so that there is not a cacophony of interfering voices. It does not, however, justify or compel divestiture of existing facilities based on some notion of economics or competition, particularly in light of recent advances in satellite, cable, microwave and other technologies. The implications of the scarcity argument do not cut with equal force in radio and television, in markets with three stations and markets with thirty, in markets which have their own local magazines and those which have none. All such substantive considerations were ignored by the court of appeals, which recites the word "scarcity" as a kind of unquestioned and unquestionable invocation of truth. But "scarcity" is but a way of introducing the concept of "value," which is, in this area, a judgment which Congress has specifically assigned to the Commission.

True, were broadcast frequencies as plentiful as soapboxes in Hyde Park, there would be no need for concern for diversity so long as free speech is guaranteed. But the public interest demands diversity of voices, *i.e.*, "outlets of self-expression," not diversity of ownership. "Voice diversity" and "ownership diversity" may in some cases go hand in hand; but in others they may not. This is why realization of the public interest in the effective use of the scarce broadcast spectrum is best achieved through rules devised on the basis of experience and expert judgment, rather than through rigid legalistic judicial logic.

The decision of the court of appeals substantially encroaches upon the Commission's Congressionally mandated responsibility, in violation of separation of powers. It transfers a basic policy judgment from the Commission to the courts.[11] In compelling divestiture in some 50 television markets and some 160 newspaper-radio combinations, many of which are located in the largest metropolitan markets, it creates a whole

[11] Competing public policy judgments are an "area where administrative judgments are entitled to the greatest amount of weight by appellate courts." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 209 (1946). The court of appeals itself has said that an agency must have latitude to select policies deemed to be in the public interest (assuming consistency with law and legislative mandate). *Greater Boston Television Corp.* v. *Federal Communications Commission*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied sub nom. WHDH, Inc.* v. *Federal Communications Commission*, 403 U.S. 923, *rehearing denied*, 404 U.S. 877 (1971). There the court of appeals characterized its role vis à vis an agency in furtherance of the public interest as a "partnership." Here, however, the partnership has been demolished and the court has taken over an improperly dominant role.

new pattern and structure for broadcasting in this country.

Congress has entrusted responsibility for regulating broadcasting to the Commission. "This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, 'not niggardly but expansive.'" *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, supra,* 395 U.S. at 380, *quoting National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943). A reviewing court is "not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971).

Section 706(2)(A) of the Administrative Procedure Act requires that an administrative decision may not be set aside unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).[12] To make this finding, the reviewing court must consider whether the decision "was based on consideration of relevant factors and whether there has been a clear error in judgment."[13] *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 416; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974). An equally "venerable principle" is that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, supra,* 395 U.S. at 381.

[12] In this case, since the Commission's Order was based on thousands of pages of written evidence, including submission of one or more sets of comments and studies by some 200 parties, and a full 2½ days of oral argument by some 45 scheduled parties, the issues raised by the court of appeals' decision would be the same if it had relied for review authority on the "substantial evidence" requirement of 5 U.S.C. §706(2)(E) rather than §706(2)(A).

[13] One opinion indicates that the court of appeals believes this latter phrase was not intended to replace *sub silentio* the traditional arbitrary and capricious standard of review. *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F.2d 1, 34-35, n.74 (D.C. Cir.), *cert. denied,* 426 U.S. 941 (1976).

The Commission's decision weighed many relevant factors in addition to the recognized value of diversity" (FCC App. B, p. 94), including the potential impact of dislocation of existing service (FCC App. B, p. 93), the benefits of existing local ownership and involvement in broadcast operations (FCC App. B, p. 93), the potential deterioration of local programming service and quality resulting from high capital costs which purchasers of divested stations would be required to bear (FCC App. B, p. 93), the superior past performance of many cross-owners (FCC App. B, p. 93, n. 26), and the existence of competing media voic-

[14] This Court has stated that "the ability of a licensee to render the best practicable service to the community reached by its broadcasts" is "an important element of the public interest." *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 475 (1940). Neither this Court nor the court of appeals has ever previously stated that diversity of information sources is of overriding importance in determining the public interest. Rather, the court of appeals has said that "avoiding concentration of control is such an important objective that the Commission must be accorded discretion in its choice of measures for its fulfillment." *Greater Boston Television Corp.* v. *Federal Communications Commission, supra,* 444 F.2d at 860. *See also McClatchy Broadcasting Co.* v. *Federal Communications Commission, supra,* 239 F.2d at 18. In its Order, the Commission used its discretion to determine that review of licensee performance at license renewal proceedings rather than divestiture was the appropriate measure. Ignoring its own statement, the court of appeals chose its own measure, divestiture.

es in affected communities (FCC App. B, p. 96). The Commission weighed these policy factors and struck a balance between no rule at all and ordering total divestiture. "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *The Permian Basin Rate Cases,* 390 U.S. 747, 792 (1968). Even an administrative order that announces a new principle does not change the permissible scope of review. *Securities and Exchange Commission* v. *Chenery Corp., supra,* 322 U.S. at 207.

Within the context of "the vaguish, penumbral bounds expressed by the standard of 'public interest,' " it is a court's task to do no more than "to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest." *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U.S. 86, 91 (1953). Because "balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty," a court "must afford great weight to the decisions of Congress and the experience of the Commission." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 102. In short, the reviewing court may not usurp the function of the Commission and substitute its own judgment for that of the agency. *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 416.[15]

[15] *See also Public Interest Research Group* v. *Federal Communi-*

The court of appeals ordered the Commission to adopt (FCC App. A, p. 60) a rule that would afford "controlling weight" to diversification. (FCC App. E, p. 167.) This Court has noted the impropriety of a reviewing court foreordaining through *ad hoc* determination an agency's orderly development of policy by commanding the adoption of its own views. *United States* v. *Saskatchewan Minerals,* 385 U.S. 94 (1966); *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17 (1952). Such restrictions not only improperly impinge on the agency's duty to reconsider the entire case, *United States* v. *Saskatchewan Minerals, supra,* but also violate the "guiding principle . . . that the function of the reviewing court ends when an error of law is laid bare. At that point, the matter once again goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co., supra,* at 20. Contrary to this instruction, the court of appeals here itself determined what rule the Commission should promulgate on remand.[16] It found that the policy of

cations Commission, 522 F.2d 1060, 1064 (1st Cir. 1975), *cert. denied,* 424 U.S. 965 (1976): "We have no license to regulate broadcasting nor to impose our private views of the public welfare."

[16] "On review, the court may correct errors of law and on remand the Commission is bound to act upon the correction." *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145 (1940). As this Court has said, a court exhausts its Congressionally-granted powers when it has laid bare the Commission's error, and compelled obedience to its correction. It can not "write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors . . ." *Id.* Similarly, the court of appeals can not write its perception of the proper relative weights to be assigned to diversity and divestiture into the statute

diversification must be given "controlling weight" (FCC App. E, p. 167). In so doing, it "usurped an administrative function." *Federal Power Commission* v. *Idaho Power Co., supra,* 344 U.S. at 20."

Such judicial overreaching transgresses the boundaries of the separation of powers. How to achieve the mandate of a statute, and determining the particular means which will do so, are an "administrative not a judicial decision." *Federal Power Commission* v. *Idaho Power Co., supra,* 344 U.S. at 21.[16] Assailing a regulation as "arbitrary and capricious" as a means to contend that the regulation is unwise or cannot succeed is not permissible. In considering the Chain Broadcasting Regulations this Court said: "It is not for us to say that the 'public interest' will be furthered or retarded by the . . . regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 224.

in the guise of correcting purported Commission "irrationality." Even a decision of less than ideal clarity must be upheld if the agency's path is reasonably discernible. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra,* 419 U.S. at 286. It has recently been said that this principle has been too often honored only in the breach. *See National Broadcasting Co., Inc.* v. *Federal Comunications Commission,* 516 F.2d 1101, 1159, n.8 (D.C. Cir. 1975), *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co., Inc.,* 424 U.S. 910 (1976) (Bazelon, J., dissenting from the order vacating the previous order granting rehearing *en banc.*)

[17] *See also National Association of Independent Television Producers and Distributors* v. *Federal Communications Commission,* 516 F.2d 526, 543 (2d Cir. 1975), where the court held that the Commission can not be compelled to adhere to an order with certain parts deleted by the court. Accordingly, it remanded the case to the Commission for reconsideration in light of the court's opinion.

[18] Judicial assumption of the ultimate policy decision in such cases is also "not conducive to the development of habits of responsibility in administrative agencies," *Federal Communications Commission* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 146. Nor is it conducive to orderly judicial administration.

II.

The Commission's Determination That Its New Rule Should Not Be Applied Retroactively in Cases Where One or More Other Media Voices Were Available in a Community Can Not Reasonably Be Said to Be "Irrational."

Having agreed that the Commission's prohibition of new cross-ownership was valid, the court below held that failure to give the prohibition retroactive effect and eliminate existing cross-ownership was "irrational." (FCC App. E, p. 165.) This extrapolation of the Commission's decision, assertedly based on logic, can not be supported.

Prospective-only application of Commission regulations is commonplace.[19] It has frequently been upheld by the courts. *See, e.g.:*

[19] In changing policies, previously approved non-conforming arrangements have frequently been grandfathered by the Commission. Other distinctions between prospective and retroactive applications of Commission regulations have frequently been made. *See, e.g., Revision of FM Broadcast Rules,* 23 P&F Radio Reg. 1801, 1831-39 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); *Distribution of Television Broadcast Signals by CATV Systems,* 2 F.C.C.2d 725, 784 (1966) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); *Cable Television Report and Order,* 36 F.C.C.2d 143, 185 (1972) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems).

The Commission has made similar distinctions in regard to new rules to promote diversification of ownership. *See e.g., Multiple*

Buckeye Cablevision Inc. v. *Federal Communications Commission,* 387 F.2d 220 (D.C. Cir. 1967) (grandfathering cable system importation of distant signals permissible in order to avoid unnecessary disruption of viewing habits);

United States v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956) (limitation on number of standard, FM and television stations upheld without requirement of divestiture);

National Broadcasting Co., Inc. v. *United States, supra,* 319 U.S. at 207 (prohibition of ownership of two stations in same area by one network and network ownership of stations in communities with so few stations or unequal coverage that competition would be restricted upheld without requiring divestiture of all such network-owned stations);

Committee for Open Media v. *Federal Communications Commission,* 533 F.2d 1 (D.C. Cir. 1976) (grant of grandfather status to cable system with fewer than 50 subscribers at effective date of Commission regulation requiring cable systems to have a certificate of compliance upheld);

Columbus Broadcasting Coalition v. *Federal Communications Commission,* 505 F.2d 320, 324 (D.C. Cir. 1974) (implicit approval of grandfathering interests which did not conform to "one to

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Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964); *Hearings on Applications for Second VHF Station,* 3 P&F Radio Reg. 2d 909 (1964); *Interim Policy on Television Multiple Ownership,* 5 P&F Radio Reg. 2d 271 (1965); *Multiple Ownership of Television Broadcast Stations,* 12 P&F Radio Reg. 2d 1501, 1507 (1968); *Multiple Ownership of Standard, FM & TV Broadcast Stations,* 22 F.C.C.2d 306 (1970).

a market rule," First Report and Order, Multiple Ownership of Standard, FM and TV Broadcast Stations, 22 F.C.C.2d 306 (1970));

Jefferson Standard Broadcasting Co. v. *Federal Communications Commission,* 297 F. Supp. 784, 785 (W.D.N.C. 1969) (recognition of grandfathering in regard to prohibition of improvement of broadcast television signals under common ownership).

An agency, of course, may give retroactive effect to a regulation, and indeed every new principle may have some retroactive effect, *Securities and Exchange Commission* v. *Chenery Corp., supra,* 322 U.S. at 203, but retroactivity is not compelled to make a regulation rational and valid. The usual question is not whether reason compels retroactivity, but whether retroactivity can meet the test of reasonableness. *See, e.g., General Telephone Company of the Southwest* v. *United States,* 449 F.2d 846 (5th Cir. 1971); *Niagara Mohawk Power Corp.* v. *Federal Power Commission,* 379 F.2d 153 (D.C. Cir. 1967); *Securities and Exchange Commission* v. *Chenery Corp., supra.* It stands logic and experience on its head to say that absence of retroactive operation is "irrational," particularly in a circumstance where the agency charged with administering a statute has found no harm to the public from limiting the application of an order to prospective operation.

In determining whether it is permissible—not mandatory—for an administrative agency to give retroactive effect to its actions, this Court has made clear that a balancing approach is required. "Retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to le-

gal and equitable principles." *Securities and Exchange Commission* v. *Chenery Corp., supra,* 332 U.S. at 203.

Because retroactive change of settled law carries the possibility of unfairness, retroactive application of new policies has been avoided on equitable principles by the courts and by administrative bodies.[20] "[C]hanges in settled law, whether by judicial decision or otherwise, frequently should be limited to prospective operation." K. Davis, ADMINISTRATIVE LAW TREATISE, § 5.09, p. 352 (1958). The practice of the Commission in regard to cross-owned facilities had been well-settled when the Order in question was adopted. (FCC App. B, p. 90.)[21] No change in circumstances has occurred.

Legislation—to which rulemaking is most closely akin—also takes a prospective course. Legislative "grandfathering" has been upheld by this Court as an appropriate means to respond to "the felt need for regulating . . . through familiar legislative devices, while at the same time [satisfying] the dictates of fair-

[20] This Court, more than a century ago, disapproved retroactive changes in administrative practices. In regard to the past practice in the exercise of discretion in government departments, this Court said: "No such change of such usages can have retroactive effect, but must be limited to the future." *United States* v. *McDaniel,* 7 *Peters* 1, 14 (1833). In only one case has this Court even implicitly required the retroactive application of a regulation, *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607 (1944). That course was taken because of the peculiar circumstances of the case and the statute involved; it was not taken because retroactivity was deemed the only permissible "rational" course for the agency. Congress later superseded the court's decision in large measure. 61 Stat. 89 (1947), 29 U.S.C. § 261. *See also United States* v. *Sullivan,* 332 U.S. 689 (1948).

[21] *See also* n. 19, p. 15, *supra.*

ness by affording sanction to enterprises theretofore established." *United States* v. *Maher,* 307 U.S. 148, 153 (1939). Prospective-only legislation is consistent with a basic distaste for retroactive law-making rooted in concepts of due process and the common law. Because of this deeply held principle against retroactivity, ambiguous statutes are presumed, in the absence of contrary intent, to operate prospectively. *Hassett* v. *Welch,* 303 U.S. 303 (1938); *Claridge Apartments Co.* v. *Comm'r.,* 323 U.S. 141, 164 (1944) ("Retroactivity, even where permissible, is not favored, except upon the clearest mandate.") The court of appeals would reverse this presumption. It would require retroactivity even without a clear mandate or evidence to suggest it is required.[22]

This Court, too, has chosen not to require state courts to give their decisions retroactive effect. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932). It has also chosen not to give its own decisions retroactive effect.[23] For example, this Court has held that embezzled funds were income, but limited that holding to prospective effect only, *James* v. *United States,* 366 U.S. 213 (1961). In *Linkletter* v. *Walker,* 381 U.S. 618 (1965), this Court held that the exclusionary rule enunciated in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), did not apply retroactively to state court convictions which had become final before *Mapp* was

[22] More often, courts have prohibited rather than required retrospective application of new agency rules, recognizing the inherent posibility of unfairness. *Retail, Wholesale and Dept. Store Union* v. *NLRB,* 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB* v. *E&B Brewing Co.,* 276 F.2d 594, 600 (6th Cir. 1960).

[23] *See* Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling,* 42 N.Y.U.L.REV. 632 (1967).

decided. A similar result was reached in regard to the *Miranda* and *Escobedo*[24] decisions in *Johnson* v. *New Jersey*, 387 U.S. 719 (1966); in regard to the *Wade* and *Gilbert* decisions[25] in *Stovall* v. *Denno*, 388 U.S. 293 (1967), and in regard to the *Griffin* decision[26] in *Tehan* v. *United States ex. rel. Shott*, 382 U.S. 406 (1966). The Court recently followed this pattern in deciding that the *Miller*[27] definition of obscenity would be applied prospectively only. *Marks* v. *United States*, decided March 1, 1977.

State courts have also overruled decisions with prospective-only application of their holdings. Such prospective overrulings have dealt with governmental,[28]

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[24] *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (exclusion of in-custody statements unless notice of Fifth Amendment rights given); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (defendant's statement in custody made without opportunity to consult counsel or warning of right to remain silent can not be used in trial against him).

[25] *United States* v. *Wade*, 388 U.S. 218 (1967) (pre-trial line-up identification, at which accused did not have counsel, must be excluded); *Gilbert* v. *California*, 388 U.S. 263 (1967) (in-court identification of accused must have source independent from line-up identification obtained in the absence of counsel).

[26] *Griffin* v. *California*, 380 U.S. 609 (1965) (prosecutor forbidden to comment adversely on defendant's failure to testify in state criminal trial).

[27] *Miller* v. *California*, 413 U.S. 15 (1974) (setting new standards to isolate "hard-core pornography" from speech protected by the First Amendment).

[28] *See e.g., Dawson* v. *Olsen*, 94 Idaho 636, 496 P.2d 97 (1972); *Molitor* v. *Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959).

charitable[29] and intra-family[30] immunity for torts, and with allocation of income between life tenant and remainderman.[31] There have been other prospective overrulings as well.[32]

The principle that a court may limit its decision to prospective applications only does not rest on a distinction between civil and criminal litigation. *Linkletter* v. *Walker, supra*, 381 U.S. at 627. "[T]he accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." *Linkletter* v. *Walker, supra*, 381 U.S. at 628.

Prospective-only application of administrative regulations is no more and no less irrational than is prospective-only court decision, or prospective-only legislation.

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[29] *See e.g., Burns* v. *Owens*, 459 S.W. 2d 303 (Mo. 1970); *Parker* v. *Port Huron Hospital*, 361 Mich. 1, 105 N.W. 2d 1 (1960); *Kojis* v. *Doctors Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 131, *modified on rehearing*, 107 N.W. 2d 292 (1961).

[30] *See e.g., Vickers* v. *Vickers*, 109 N.H. 169, 242 A.2d 57 (1968); *Schwartz* v. *U.S. Rubber Corp.*, 112 N.J. Super. 595, 272 A.2d 310 (1971); *Fountain* v. *Fountain*, 214 Va. 347, 200 S.E. 2d 513 (1973), *cert. denied*, 416 U.S. 939, *rehearing denied*, 417 U.S. 927 (1974); *Balts* v. *Balts*, 273 Minn. 419, 142 N.W. 2d 66 (1966); *Goller* v. *White*, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963).

[31] *See e.g., Langdell* v. *Dodge*, 100 N.H. 118, 122 A.2d 529 (1956).

[32] For other examples of state court prospective-only rulings, *see* Comment Note, 10 A.L.R. 1371 (1966).

CONCLUSION

The questions raised by the petition are of great substantive importance, and of great importance to the sound development of administrative law. The petition for certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1471 *et al.*

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioner,

v.

NATIONAL CITIZENS' COMMITTEE FOR BROADCASTING, *et al.*,
Respondents.

STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Attorney General
State of Utah
State Capitol
Salt Lake City, Utah 84114
Amicus Curiae

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1471 *et al.*

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioner,

v.

NATIONAL CITIZENS' COMMITTEE FOR BROADCASTING, *et al.*,
Respondents.

STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Attorney General for the State of Utah hereby submits this statement *amicus curiae* pursuant to Rule 42, 4, of the Rules of this Court, and urges this Court to grant the petitions for certiorari filed in this proceeding because the decision below fails to follow the important decision of this Court in *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), and fails to give due consideration to all factors affecting the public interest.

Interest of Attorney General in this Proceeding

The Office of Attorney General is established by the Utah Constitution, Article VII, § 18. Since 1898, it has

been the duty of the Utah Attorney General to act as attorney for the State in "all civil legal matters in which the State is in *anywise* interested" (emphasis added), § 67-5-1-(1), Utah Code Annotated (1953). While it has seldom been the practice of the Attorney General to appeal on behalf of the State of Utah in matters between a private citizen and a federal agency or court, there are some such matters which, because the interest of the State and its citizens is so substantial, compel action by the Attorney General. The instant proceeding is one of those matters.[1]

It is the citizens of Utah who are most directly affected by the quality of radio and television programming offered in Utah. It is the citizens of Utah who would be most affected if the decision of the Court below is allowed to stand. It is the citizens of Utah who would be most directly affected if the licenses of the KSL stations or ownership of the *Deseret News* should pass to non-Utah interests. This is particularly true because of the fact that development and operation of each has resulted from a response from their present ownership to meet the needs of the community and to fill a void when the newspaper, in 1850, and the broadcast stations, beginning in 1922, were organized.

Because of the long record of outstanding public service and professional excellence rendered by the KSL stations over the last 55 years, the KSL stations have earned the

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[1] On July 3, 1975, the Attorney General filed a memorandum in support of the granting of the renewal applications of KSL, KSL-FM and KSL-TV, all licensed to KSL INCORPORATED, one of the parties to this proceeding. The issues raised by the Department of Justice in that proceeding, though more narrowly focused on the specific operations of the KSL stations, are similar to those which underly this proceeding, *i.e.*, whether mere cross ownership of television and newspapers should override the demonstrated record of KSL to serve the public interest of the people residing in the state of Utah.

unquestioned standing as the leading radio and television stations in Utah, responsive to the public need. The *Deseret News*, commonly owned with the KSL stations, has similarly earned premier status and has rendered valuable service to the citizens of Utah over the last 127 years. The requirement, mandated by the decision of the court below, that the owner of the *Deseret News* either relinquish the license of the KSL stations or sell the *Deseret News* would result in a loss of immeasurable magnitude to the citizens of Utah, especially if such ownership were to come to rest with non-Utah interests.

Argument

The decision of the court below requires the Federal Communications Commission, in fulfilling its mandate and obligation to issue broadcast licenses, to adopt a virtually irrebuttable presumption, and to promulgate the presumption into a rule, that diversity of ownership of the media of mass communication (in this case, newspapers and broadcast stations) takes precedence over all other components of the public interest, convenience and necessity. This holding of the court below is based on the belief of the court that diversity of ownership will automatically bring increased competition to the marketplace of ideas in furtherance of the policies underlying the First Amendment and the antitrust laws. The holding of the court below is directly contrary to prior decisions of this Court.

No one disputes that the public interest standard of the Communications Act of 1934 invites reference to the First Amendment and antitrust policies of the United States. However, this Court has repeatedly held that the public interest standard is broader than either of these two policies and requires the exercise of the Commission's expertise to strike the proper balance among all the com-

peting policies which comprise the public interest standard. Not all such pertinent factors were considered by the court below.

As this Court said in *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953):

> "Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest requires in each case a blend of private forces and public intervention.
>
> . . .
>
> "To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conf.* v. *United States*, 342 U.S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, cf. *Labor Board* v. *Seven-Up Co.*, 344 U.S. 344, 348, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. Although we think RCAC's contention that an applicant must demonstrate tangible benefits is asking too much, it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough." 346 U.S. at 93-97.

The presumption required by the holding of the court below is directly in conflict with this doctrine.[2] The Commission's decision in this proceeding recognized both the obligation imposed by the Communications Act and the holdings of this Court in weighing the various factors involved in determining the public interest, convenience and necessity. The court below, however, improperly refused to find itself bound by those requirements.

As this Court also said in the *RCA* case:

> "Whatever the reasons, [for the Commission considering other factors to have outweighed the competitive factor] they are not for us to weigh; it is for us to recognize that encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest." 346 U.S. at 93.

Conclusion

Because of the failure of the court below to follow existing precedent of this Court and to consider all factors which affect the public interest, convenience and necessity, the petitions for certiorari should be granted.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General
State of Utah
Amicus Curiae

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[2] See also, *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190 (1943); *U.S.* v. *RCA*, 358 U.S. 334 (1959); *Bowman Transportation, Inc.*, v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974). Ironically, the holding of the court below contradicts its own earlier decisions which agreed with the doctrine pronounced in the *RCA* case. See, *McLatchy Broadcasting Co.* v. *FCC*, 239 F.2d 15 (D.C. Cir. 1956); *Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974).

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Nos. 76-1471, 76-1521, 76-1595,
76-1604, 76-1624, 76-1685

FEDERAL COMMUNICATIONS COMMISSION;
CHANNEL TWO TELEVISION COMPANY, *et al.*;
NATIONAL ASSOCIATION OF BROADCASTERS;
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION;
ILLINOIS BROADCASTING COMPANY, INC.; and
POST COMPANY, *et al.*,

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Volume I – Pages 1-444

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PETITIONS FOR WRITS OF CERTIORARI FILED
April 22, 1977; May 2, 1977; May 13, 1977;
May 16, 1977; May 20, 1977; and May 27, 1977;
CERTIORARI GRANTED OCTOBER 3, 1977

TABLE OF CONTENTS

Page

VOLUME I:

DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN NOS. 75-1064, 75-1152, 75-1263, 75-1289, 75-1327, 75-1379, 75-1386, 75-1387, 75-1388, 75-1567, 75-1614, 75-1618 1

FEDERAL COMMUNICATIONS ACT OF 1934, AS AMENDED, 47 U.S.C. §151 *et seq.*

§152(a) 27
§154(i) 27
§154(j) 27
§301 28
§303(g) 29
§303(r) 29
§307(a) 29
§307(d) 30
§309(a) 31
§309(d) 31

FIRST REPORT AND ORDER (Docket No. 18110), 22 FCC 2d 306 (1970) 33

FURTHER NOTICE OF PROPOSED RULEMAKING (Docket No. 18110), 22 FCC 2d 339 (1970) 101

MEMORANDUM OPINION AND ORDER (Docket No. 18110), 45 FCC 2d 768 (1974) 127

SECOND REPORT AND ORDER (Docket No. 18110), 50 FCC 2d 1046 (1975) (text of rules adopted by FCC appears at 50 FCC 2d 1099) 134

MEMORANDUM OPINION AND ORDER (ON RECONSIDERATION) (Docket No. 18110), 53 FCC 2d 589 (1975) (modification of certain rules adopted by FCC appears at 53 FCC 2d 599) 317

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 555 F.2d 938 (1977) 339

Page

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (1977) 432

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ON MOTION FOR STAY OF MANDATE, 555 F.2d 967 (1977) 435

VOLUME II (Exhibits):

LEGAL OPINION OF FCC GENERAL COUNSEL HAMPSON GARY SUBMITTED TO THE SENATE INTERSTATE COMMERCE COMMITTEE, January 25, 1937 445

M.H. SEIDEN & ASSOCIATES, INC., "MASS COMMUNICATIONS IN THE UNITED STATES – 1970," SUMMARY VOLUME (1971) (RESEARCH CONDUCTED ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS) 466

ANDERSON, "BROADCAST STATIONS AND NEWSPAPERS: THE PROBLEM OF INFORMATION CONTROL: A CONTENT ANALYSIS OF LOCAL NEWS PRESENTATIONS" (1971) (NAB EXHIBIT E), pp. 1-46 593

COMMENTS OF NAB (1971), pp. 11-24; 59-63 643

STERLING, "OWNERSHIP CHARACTERISTICS OF BROADCASTING STATIONS AND NEWSPAPERS IN THE TOP 100 MARKETS: 1922-1967" (March 5, 1971) (NAB Exhibit C), pp. 1-31 659

ROBBINS, "A STUDY OF PIONEER AM RADIO STATIONS AND PIONEER TELEVISION STATIONS" (April 1971) (NAB Exhibit D), pp. 1-21 694

COMMENTS OF ANPA (April 2, 1971), pp. 54-58 713

COMMENTS OF THE HOUSTON POST COMPANY, CHANNEL TWO TELEVISION COMPANY, AND KPRC RADIO COMPANY (May 17, 1971), pp. 16-25 719

Page

COMMENTS OF A.H. BELO CORPORATION (May 17, 1971), pp. 8-9 730

COMMENTS OF THE WASHINGTON POST COMPANY AND POST-NEWSWEEK STATIONS, CAPITOL AREA, INC. (May 17, 1971), pp. 2-4 732

COMMENTS OF THE PULITZER PUBLISHING COMPANY (May 17, 1971) 734

VOLUME III (Exhibits):

NAB REPLY COMMENTS AND ARGUMENTS ON THE PROPOSED RULES, APPENDICES B, C, AND D (August 18, 1971) 743

REPLY COMMENTS OF STEPHEN R. BARNETT (August 19, 1971), pp. 17-22; 27-40; 73-81; 147-159; 190-194 774

COMMENTS OF POST-NEWSWEEK STATIONS, CAPITOL AREA, INC. (May 1974), pp. 6-17 824

FURTHER COMMENTS OF NCCB (May 15, 1974) 835

SUPPLEMENT TO NAB EXHIBIT C REGARDING CROSS-OWNERSHIP OF BROADCAST STATIONS AND NEWSPAPERS (May 1974) 866

SUPPLEMENTAL STATEMENT OF NAB AND EXHIBIT F REGARDING RECENT TRANSFERS OF BROADCASTING STATIONS (REVISED) (May 1974) 872

FURTHER COMMENTS OF THE PULITZER PUBLISHING COMPANY AND KSD/KSD-TV, INC. (May 15, 1974) 887

REPLY COMMENTS OF POST-NEWSWEEK STATIONS, CAPITOL AREA, INC. (June 17, 1974) 899

FCC PUBLIC NOTICE 26054-B, "HEARING CALENDAR" (July 15, 1974) 922

TRANSCRIPT OF ORAL ARGUMENT IN DOCKET 18110 (July 1974), pp. 130-145; 158-161; 179-181; 186-194; 380-385; 440-445 925

Page

RAND CORPORATION STUDY, R-1585-MF, "NEWSPAPER-TELEVISION STATION CROSS–OWNERSHIP: OPTIONS FOR FEDERAL ACTION: (September 1974), Tables 7-10 967

LETTER TO CHAIRMAN WILEY AND COMMISSIONER HOOKS AND EDWARD HAYES ON BEHALF OF THE NATIONAL BLACK MEDIA COALITION (September 9, 1974) 983

BARNETT, S., "CROSS-OWNERSHIP OF MASS MEDIA IN THE SAME CITY: A REPORT TO THE JOHN AND MARY MARKLE FOUNDATION: (Sept. 23, 1974), pp. 1-2; 10-19; 31-64 990

General Docket

United States Court of Appeals
for the
District of Columbia Circuit

Nos. 75-1064, 75-1152, 75-1263, 75-1289, 75-1327, 75-1379, 75-1386, 75-1387, 75-1388, 75-1567, 75-1614, 75-1618*

Date	Filings – Proceedings
	1975
Jan. 28	National Citizens Committee for Broadcasting (NCCB) petition for review of an order of the FCC [75-1064]
28	Certified copy of petition for review of an order of the FCC was mailed to FCC [75-1064]
31	NCCB's motion for leave to amend Petition for Review [75-1064]
Feb. 13	Certificate of Service for Petition for Review [75-1064]
18	Motion of Elyria-Lorain Broadcasting Company for leave to intervene [75-1064]

*Case numbers, listed in brackets, denote the Docket in which the pleading is recorded. As case Nos. 75-1152, 75-1263, 75-1289, 75-1327, 75-1379, 75-1386, 75-1387, 75-1388, 75-1567, 75-1614, and 75-1618 are consolidated with No. 75-1064, only No. 75-1064 is listed as a reference, when appropriate.

18 Motion of WEEU Broadcasting Company for leave to intervene [75-1064]

20 Owosso Broadcasting Company's, Inc. petition for review for an order of the FCC [75-1152]

21 Certified copy of a petition for review of an order of the FCC was mailed to FCC U.S. Attorney General [75-1152]

24 Order per CJ Bazelon granting NCCB's motion for leave to amend petition for review [75-1064]

24 Amended petition for review [75-1064]

26 Motion of The Hearst Corp., for leave to intervene [75-1064]

26 Motion of Scripps-Howard Broadcasting Co., et al., for leave to intervene [75-1064]

26 Motion of Belo Broadcasting Corp., for leave to intervene [75-1064]

26 Motion of Washington Post Co., et al., for leave to intervene [75-1064]

26 Motion of WHAS, Inc., for leave to intervene [75-1064]

26 Motion of the American Newspaper Publishers Assoc., for leave to intervene [75-1064]

27 Motion of General Electric Broadcasting Company, Inc. for leave to intervene [75-1064]

27 Motion of Forward Communications Corporation, et al. for leave to intervene [75-1064]

27 Motion of American Broadcasting Companies, Inc. for leave to intervene [75-1064]

27 Motion of Lee Enterprises, Inc., et al. for leave to intervene [75-1064]

27 Motion of Illinois Broadcasting Company, Inc. et al., for leave to intervene [75-1064]

27 Motion of Houston Post Company, et al. for leave to intervene [75-1064]

28 Motion of Louisiana Television Broadcasting Corp. for leave to intervene [75-1064]

28 Motion of KUTV, Inc. for leave to intervene [75-1064]

28 Clerk's order granting motions of Elyria-Lorain Broadcasting Co., WEEU Broadcasting Company, The Hearst Corp., Scripps-Howard Broadcasting Co., Belo Broadcasting Corp., Washington Post Co., et al., WHAS, Inc., and the American Newspaper Publishers Association for leave to intervene herein; counsel for the intervenors are encouraged to file joint briefs wherever practicable and may participate in oral argument only to the extent all are able under Rule 12 of the General Rules of this Court [75-1064]

Mar. 6 Certified index to record [75-1064]

10 Clerk's order sua sponte, that the first paragraph of the order filed February 28, 1975 is amended by adding the words "and the W.E. Scripps Company" [75-1064]

12 FCC's and US's motion to consolidate 75-1064 and 75-1152 [75-1064, 75-1152]

14 Clerk's order granting motions for General Electric Broadcasting Co., Inc.; Forward Communications Corp. et al.; American

Broadcasting Co. Inc.; Lee Enterprises, Inc.; Illinois Broadcasting Co. Inc.; Houston Post Co. et al.; Louisiana Television Broadcasting Corp., and KUTV Inc. for leave to intervene; counsel for the intervenors are encouraged to file joint briefs wherever practicable and may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of this Court [75-1064]

18 Gazette Printing Company's petition for review of an order of the FCC [75-1263]

18 Certified copy of a petition for review of an order of the FCC mailed to the FCC and the Attorney General [75-1263]

21 FCC's motion to hold in abeyance [75-1064, 75-1152]

24 National Association of Broadcasters' (NAB) petition for review of an order of the FCC [75-1289]

24 Certified copy of the petition for review of an order of the FCC was mailed to the FCC and the U.S. Attorney General [75-1289]

28 Clerk's order granting FCC's motion to consolidate and Nos. 75-1064 and 75-1152 are consolidated for consideration on the merits [75-1064, 75-1152]

31 United States petition for review of an order of the FCC [75-1327]

31 Response of U.S. to motion of FCC to hold in abeyance [75-1064]

Apr. 1 Certified copy of a petition for review of an order of the FCC was mailed to FCC and the U.S. Attorney General [75-1327]

3 Joint motion of Lee Enterprises, Inc. and WKY Television System, Inc. for leave to intervene [75-1327]

3 NCCB's motion for leave to file a response to motion to hold in abeyance [75-1064]

3 Proceedings transferred from the United States Court of Appeals for the 4th Circuit [75-1386, 75-1387, 75-1388]

3 Order granting motion of WHAS, Inc. for leave to intervene (filed in 4th Circuit) [75-1386, 75-1387, 75-1388]

3 Order granting motion of Louisiana Television Broadcasting Corporation for leave to intervene (filed in 4th Circuit) [75-1386, 75-1387, 75-1388]

3 Motion of the National Citizens Committee for Broadcasting for leave to intervene (filed in 4th Circuit) [75-1386, 75-1387, 75-1388]

3 Order granting consolidation of 75-1387, 75-1388 (filed in 4th Circuit) [75-1386, 75-1387, 75-1388]

7 FCC's and US's motion to further consolidate case with Nos. 75-1263, 75-1289 and 75-1327 [75-1064, 75-1327, 75-1289, 75-1263]

9 Order per Wright ACJ, that the time for filing NCCB's brief in the consolidated cases is extended to June 8, 1975 [75-1064]

9 Response of National Citizens Committee for Broadcasting, to the FCC's motion to hold in abeyance [75-1064]

10 Clerk's order granting NCCB's motion to accept late filed response to FCC's motion to

hold in abeyance and the Clerk is directed to file NCCB's response to the motion to hold in abeyance [75-1064]

10 Response of NCCB to the FCC's motion to hold in abeyance [75-1064]

11 Proceedings transferred from the U.S. Court of Appeals for the 8th District [75-1379, 75-1064]

11 Motion of WHAS, Inc. for leave to intervene (filed in 8th Circuit) [75-1379, 75-1064]

11 Motion of Louisiana Television Broadcasting Corp. for leave to intervene (filed in 8th Circuit) [75-1379, 75-1064]

11 FCC's and US's motion to transfer (filed in 8th Circuit) [75-1379, 75-1064]

11 WJAG's, Inc. opposition for motion to transfer (filed in 8th Circuit) [75-1379, 75-1064]

16 Clerk's order granting motion by WHAS, Inc. and Louisiana Television Corporation for leave to intervene in this case. Counsel for the intervenor may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of the Court [75-1379, 75-1064]

23 Motion of Chronicle Publishing Company, et al. for leave to intervene [75-1327]

23 Clerk's order granting FCC's and US's motion to consolidate and Nos. 75-1064, 75-1152, 75-1263, 75-1289, and 75-1327 are consolidated for consideration on the merits [75-1064, 75-1327, 75-1289, 75-1263]

24 Motion of Houston Post Company and Channel Two Television Company for leave to intervene [75-1327]

29 Motion of Pulitzer Publishing Company and KSD/KSD-TV Inc. for leave to intervene [75-1327]

29 Motion of American Newspaper Publishers Association (ANPA) for leave to intervene [75-1327]

29 Motion of KNUJ and Michelson Media Inc. for leave to intervene [75-1327]

30 Motion of the Post Co. for leave to intervene [75-1327]

30 Motion of KSL Inc. for leave to intervene [75-1327]

May 5 Clerk's Order granting motions of Lee Enterprises, Inc. and WKY Television System, Inc., Chronicle Publishing Company, et al., Houston Post Company, and Channel Two Television Company, Pulitzer Publishing Company, and KSD/KSD-TV Inc., American Newspaper Publishers Association, KNUJ and Michelson Media Inc., Post Company and KSL, Inc. for leave to intervene herein. Counsel for the intervenors may participate in oral argument only to the extent allowable under Rule 12 of the general rules of this Court [75-1327]

5 FCC's and US's motion to further consolidate cases with 75-1379, 75-1386, 75-1387 and 75-1388 [75-1064, 75-1386, 75-1379]

12 Clerk's order that FCC's and US's motions are granted and Nos. 75-1379, 75-1386, 75-1387

and 75-1388 are consolidated with Nos. 75-1064, 75-1152, 75-1263 and 75-1289 and 75-1327 for consideration on the merits; and the certified list of record filed in case No. 75-1064 be deemed filed in the consolidated cases as of the date of this order [75-1064, 75-1386, 75-1379]

12 Certified index to record (originally filed in No. 75-1064) [75-1289, 75-1263, 75-1152, 75-1327, 75-1387, 75-1386, 75-1379, 75-1388]

15 NAB's motion for clarification of proceedings and establishment of briefing schedule [75-1289]

20 FCC's and US's response to NAB's motion of clarification of proceedings and establishment of briefing schedule (filed by FCC) [75-1289]

20 Statement of Gazette Printing Company in 75-1263 in support of NAB's motion for clarification proceedings and establishment of briefing schedule [75-1289]

20 Gazette Printing Company's statement in support of the motion for clarification of proceedings and establishment of briefing schedule filed in No. 75-1289 [75-1263]

21 United States' response to NAB's motion for clarification of proceedings and establishment of briefing schedule [75-1289]

22 Comments of Daily Telegraph Printing Company in Nos. 75-1387, in support of NAB's motion for clarification of proceedings in establishment of briefing schedule [75-1289, 75-1387]

27 Response of NCCB in No. 75-1064 to NAB's motion for clarification on proceedings in establishment of briefing schedule [75-1289]

27 NCCB's response to motion of NAB in No. 75-1289 for clarification of proceedings and establishment of briefing schedule [75-1064]

30 NAB's motion to dismiss petition in No. 75-1327 and strike pleadings filed by Justice Department in all consolidated cases [75-1289, 75-1327]

June 5 Response of US in No. 75-1327 to motion to dismiss petition and strike pleadings [75-1327, 75-1289]

6 Order per CJ Bazelon that the time for filing petitioners briefs in the consolidated cases is extended to September 30th; no further extensions of time for filing petitioners briefs will be granted except for extraordinary cause shown [75-1386, 75-1379, 75-1064]

6 ANPA's petition for review of an order of the FCC [75-1567]

9 Certified copy of petition for review of an order of the FCC was mailed to the FCC and the Attorney General of the United States by certified mail return receipt requested [75-1567]

9 FCC's response to the motion to dismiss petition and strike pleadings [75-1289]

11 NAB's reply to response of United States, in No. 75-1327 to motion to dismiss petition and strike pleadings [75-1289, 75-1327]

16 Notice of Substitution of attorney for intervenor, WHAS, Inc. [75-1064, 75-1379]

24 Brockway Company's petition for review of an order of the FCC [75-1614]

25 Certified copy of petition for review of an order of the FCC was mailed to FCC and the U.S. Attorney General; petition for review was sent by certified mail return receipt requested [75-1614, 75-1618]

25 Gray Communications Systems, Inc. petition for review of an order of the FCC [75-1618, 75-1614]

July 8 Return receipt for copy of petition for review of an order of the FCC from Attorney General of the U.S. and FCC [75-1614]

9 FCC's motion to consolidate case with Nos. 75-1567, 75-1614, and 75-1618 and motion to deem record filed [75-1064, 75-1614, 75-1567, 75-1618, 75-1386, 75-1379]

11 Motion of WKY TV to change name to Gaylord Broadcasting Company on the court records [75-1064]

15 Clerk's order granting FCC's and US's motion to consolidate and Nos. 75-1064, 75-1152, 75-1263, 75-1289, 75-1327, 75-1379, 75-1386, 75-1387, and 75-1388 are hereby consolidated for consideration on the merits; the certified index to the record in 75-1064 is deemed to be the certified index to the record in 75-1567, 75-1614 and 75-1618 [75-1064, 75-1614, 75-1567, 75-1618, 75-1386, 75-1379]

16 Clerk's order, sua sponte, that this Court's order of July 14, 1975 is amended by deleting the second paragraph thereof and substituting therefor the following: the motion is granted and 75-1064, 75-1152, 75-1263, 75-1289, 75-1327, 75-1379, 75-1386, 75-1387, 75-1388, 75-1567, 75-1614, and 75-1618 are hereby consolidated for consideration on the merits [75-1064, 75-1614, 75-1618, 75-1567, 75-1379, 75-1386]

18 Clerk's order granting motion of WKY Television System Inc. to change name on Court records and the Clerk is directed to change the name of WKY Television System Inc. in case Nos. 75-1064 and 75-1327 to Gaylord Broadcasting Co. [75-1064]

28 FCC's motion to leave to supplement the record in Nos. 75-1567, 75-1614, and 75-1618 [75-1614, 75-1567, 75-1618]

31 Clerk's order granting FCC motion for leave to supplement the record in No. 75-1567, 75-1614, 75-1618 [75-1614, 75-1567, 75-1618]

31 Supplement to certified index to record [75-1614, 75-1618, 75-1567]

Sept. 5 Brockway Company's motion to correct the record in this case [75-1614]

16 Clerk's order granting NCCB's motion to correct record in No. 75-1614 and counsel for the party shall make appropriate arrangements to include the Oct. 11, 1974 letter with attachments from James W. Higgins, General

Manager of the Brockway Company to Richard E. Wiley, Chairman of the FCC as a supplement item to the certified index to record in these cases [75-1064]

19 Petitioner's joint motion to proceed under Rule 30(c) [75-1289, 75-1387]

29 Clerk's order granting joint motion to proceed under Rule 30(c) and counsel for parties in the consolidated cases are granted leave to proceed under the provision of Rule 30(c) of the FRAP; in lieu of submitting one copy of the typewritten or page proof brief provided under Rule 30(c) of the FRAP, counsel for the parties shall submit seven copies thereof for filing; counsel for the parties are encouraged to file joint briefs wherever practicable [75-1064]

29 Brockway Company's brief [75-1614]

30 Motion of Public Interest Research Group, et al. for leave to file brief as amicus curiae [75-1064]

30 Gray Communications Systems brief [75-1618]

30 Owosso Broadcasting Company's Inc. brief [75-1152, 75-1289, 75-1263, 75-1387, 75-1614]

Oct. 1 WJAG's Inc. brief [75-1379]

2 US's motion to dismiss petition for review [75-1327]

3 NCCB's motion for leave to file brief time having expired [75-1064]

14 Order per CJ Bazelon granting NCCB's motion in No. 75-1064, for leave to file brief time having expired, conditioned upon the brief being brought into compliance with the rules of this Court [75-1064]

14 NCCB's brief [75-1064]

14 FCC's motion to revise briefing schedule [75-1064]

16 Motion of The Post Company for leave to file motion for leave for change of intervention [75-1064]

16 Motion of KNUJ, Inc. and Michelson Media, Inc. for leave to file motion for leave for change of intervention [75-1064]

17 Motion of the Chronicle Publishing Company, et al. for leave to intervene, time having expired [75-1064]

20 Clerk's order granting FCC's and US's motion to revise briefing schedule and the following schedule shall apply; FCC's and US's brief - January 5, 1976; reply brief February 10, 1976 [75-1064]

20 Per Curiam order that NCCB's motion to dismiss its petition in No. 75-1327 granted, and the motion of NAB's in No. 75-1289, to dismiss petition, and stay pleadings, is dismissed as moot; Wright and McGowan, CJ [75-1064]

20 Clerk's order granting motion for leave to file brief amicus curiae of the Public Interest Research Group, et al. and the Clerk is directed to file the brief of the Public Interest Research Group, et al. [75-1064]

20 Brief for amicus curiae Public Interest Research Group, et al. [75-1064]

22 Motion of KSL, Inc. for leave to file motion for leave to intervene [75-1064]

23 Motion of Pulitzer Publishing Company and KSD/KSD-TV, Inc. for leave to file motion for leave to change intervention from #75-1327 to #75-1064 [75-1064]

Nov. 3 Clerk's order directing the Clerk to file the motions for change of intervention of The Post Co. and KNUJ, Inc. and Mickelson Media, Inc. for leave to intervene [75-1064]

3 Clerk's order directing the Clerk to file the motions for change of intervention of The Post Co. and KNUJ, Inc. and Mickelson Media, Inc. and also Chronicle Publishing Co.; Chronicle Broadcasting Co.; Buffalo Evening News, Inc. and WBEN, Inc.; all aforesaid motions for leave to intervene are granted; counsel for the intervenors may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of this Court [75-1064]

3 KNUJ, Inc. and Mickelson Media, Inc. motion for leave for change of intervention [75-1064]

3 The Post Company motion for leave for change of intervention [75-1064]

6 Order per CJ Bazelon directing the Clerk to file the motion of Pulitzer Publishing Co. and KSD/KSD-TV, Inc. for leave for change of intervention in No. 75-1064 and the motion of KSL, Inc. for leave to intervene in the

consolidated cases; the motions for intervention are granted and counsel for the intervenors are encouraged to file joint briefs wherever practicable and may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of this Court [75-1064]

6 The Pulitzer Publishing Co. and KSD/KSD-TV Inc. motion for leave for change of intervention [75-1064]

6 Motion of KSL Inc. for leave to intervene - granted [75-1064]

21 FCC's motion to revise briefing schedule [75-1064]

Dec. 2 Clerk's order that the time for filing responsive briefs in the cases is extended to January 26, 1976; the time for filing reply briefs, if any, to US and FCC and supporting intervenors; briefs are extended until 45 days after service of the brief [75-1064]

10 Owosso Broadcasting Company's Inc. brief [75-1152]

24 FCC's motion to revise briefing schedule [75-1064]

1976

Jan. 9 Clerk's order granting FCC's and US's motion to revise briefing schedule and the times for filing the remaining papers in the consolidated cases are extended as follows: Respondent's and supporting intervenors' briefs shall be filed by February 17, 1976; and Petitioners' and supporting intervenors' reply briefs, if

any, shall be filed within 45 days after service of respondents' briefs [75-1064]

13 Intervenors' (Elyria-Lorain Broadcasting Co., WEEU Broadcasting Co., WHAS, Inc., Louisiana Television Broadcasting Corp., Belo Broadcasting Corp., Hearst Corp., Scripps-Howard Broadcasting Co., W.E. Scripps Co., Chronicle Broadcasting Co., Chronicle Publishing Co., Buffalo Evening News, Inc., WBEN, Inc., Lee Enterprises, Inc., Gaylord Broadcasting Co., Houston Post Co., Channel Two TV Co., KPRC Radio Co., Illinois Broadcasting Co., Inc., and Lindsay-Schaub Newspapers, Inc.) motion to adopt in toto brief of intervenor, American Newspaper Publishers Association [75-1618]

30 FCC's motion for an order prohibiting Gray Communications System's Inc. and counsel from prosecuting inaction which is now pending in the U.S. District Court for the middle district of Georgia [75-1618]

Feb. 10 Gray Communications System's response to motion for an order prohibiting further prosecution of the case pending in another court [75-1618]

10 FCC's reply to response to motion of an order prohibiting prosecution of the case pending in another court [75-1618]

17 Clerk's order, sua sponte, that the order filed November 6, 1975 is amended by adding the number 75-1379 and deleting the number 75-1329 [75-1064]

17 American Newspaper Publishers Association's brief [75-1064]

17 KNUJ's Inc.; Michelson Media's, Inc. and the Post Company's joint brief [75-1064]

17 WHAS's, Inc. brief [75-1064]

17 Elyria-Lorain Broadcasting Company, WEEU Broadcasting Company, Louisiana Television Broadcasting Corp., to adopt in toto brief of intervenor, The Washington Post Company and Post-Newsweek Stations, Inc. [75-1064]

17 KSL's Inc. brief [75-1064]

18 The Washington Post Company and Post-Newsweek Stations, Capital Area's, Inc. brief [75-1064]

19 FCC's motion for leave to file supplement to reply filed February 10 [75-1618]

19 Washington Post Company and Post-Newsweek Station's et al. motion for leave to amend brief [75-1064]

19 US's brief [75-1064]

20 FCC's brief [75-1064]

20 Clerk's order granting intervenors' Elyria-Lorain Broadcasting Co., WEEU Broadcasting Co., WHAS, Inc., and Louisiana Television Broadcasting Corp., et al. motion to adopt in toto brief of intervenor, American Newspaper Publishers Association and the Clerk is directed to transmit a copy of ANPA's motion to the division of this Court assigned to consider the cases on the merits [75-1064]

23 Clerk's order granting intervenors' Elyria-Lorain Broadcasting Company, et al. to adopt in toto brief of intervenors the Washington Post Company and Post-Newsweek Stations, Inc.; the Clerk is directed to transmit a copy of the motion to the division of this Court assigned to consider the case on the merits [75-1064]

23 FCC's motion for leave to file reply brief to brief of US filed 2/17/76 [75-1064]

25 Clerk's order granting FCC's motion for leave to file supplement to the reply [75-1618]

25 FCC supplement to reply to respond to motion for an order prohibiting further prosecution of the case pending in another court [75-1618]

27 Clerk's order granting intervenor's (The Washington Post Company and Post-Newsweek Station, Inc. et al.) motion for leave to amend brief and counsel for the intervenors shall make appropriate arrangements to insert the substitute page [75-1064]

Mar. 11 Order per CJ Bazelon that respondent, FCC, is granted leave to file a reply brief the brief of the United States not to exceed 25 pages, and intervenors on its side are granted leave to file a joint reply brief not to exceed 35 pages on or before April 5, 1976; sua sponte, that the time for filing petitioners' reply briefs is extended until 45 days from the date of service of the aforesaid reply briefs [75-1064]

11 ANPA in No. 75-1567 motion to extend time to file joint appendix to 21 days after service of all reply briefs [75-1064]

16 Clerk's order granting motion of American Newspaper Publishers Association motion on behalf of all petitioners to extend date for submission of joint appendix and the time for filing the joint appendix is extended to April 26th [75-1064]

26 ANPA's motion to extend time to file joint appendix to 21 days beyond filing petitioner's reply brief [75-1567]

29 NCCB's motion to have this case and No. 75-1308 argued before the same panel [75-1064]

30 Clerk's order that the motion of ANPA's supplemental to extend date for submission of joint appendix in case no. 75-1567 is granted and the time for filing the joint appendix of the parties in these consolidated proceedings is extended to June 10, 1976 [75-1064]

Apr. 5 FCC's opposition to motion to have this case, and No. 75-1308 argued before the same panel (filed in No. 75-1308 only) [75-1064]

5 Motion of Intervenors' (Chronicle Broadcasting Co., The Chronicle Publishing Co., Buffalo Evening News, Inc., WBEN, Inc., Houston Post Co., Channel Two Television Co., KPRC Radio Co., Illinois Broadcasting Co., Inc., and Lindsay-Schaub Newspapers Inc.) to adopt in toto the reply brief of Respondent, FCC [75-1064]

5 Intervenors' (Belo Broadcasting Corp., WHAS, Inc., The Washington Post Co., and Post-Newsweek Stations, Capital Area, Inc.) joint reply brief [75-1064]

6 FCC's brief (This is FCC reply brief) [75-1064]

7 FCC's opposition to motion to have this case and No. 75-1308 argued before the same panel [75-1064]

7 Intervenors' (Washington Post Co., Post-Newsweek Stations, Capital Area, Inc., Belo Broadcasting Corp., WHAS, Inc., Louisiana Television Broadcasting Corp.) motion to substitute pages in joint reply brief [75-1064]

13 Clerk's order granting intervenors' (Washington Post Co., Post-Newsweek Stations, Capital Area, Inc., Belo Broadcasting Corp., WHAS, Inc., Louisiana Television Broadcasting Corp.) motion filed April 7, 1976 to substitute pages in joint reply brief and counsel for intervenors herein shall make appropriate arrangements to correct the joint reply brief [75-1064]

20 Clerk's order granting intervenors' (Chronicle Broadcasting Co., et al.) motion to allow intervenors to adopt in toto reply brief of respondent FCC [75-1064]

21 Order per CJ Bazelon denying appellant's motion in No. 75-1308 for consecutive amendment with Nos. 75-1604 et al. [75-1064]

28 Per Curiam order that US's and FCC's motion for an order prohibiting petitioners and counsel from prosecuting an action which is now pending in the US District Court for the middle district of Georgia is referred to the division of this Court assigned to hear this case on the merits for disposition Robinson and Wilkey [75-1618]

May 7 NAB's motion to strike brief of the Department of Justice and bar further participation of de facto petitioner [75-1289]

14 Motion of the United States of America for extension of time within which to respond to motion of the National Association of Broadcasters to strike [75-1289]

18 Clerk's order granting motion of the United States of America to extend time to respond to NAB's motion to strike to May 26, 1976 [75-1289]

20 NAB's reply brief [75-1289, 75-1567]

20 The Brockway Company's reply brief [75-1614, 75-1618]

21 NCCB's reply brief [75-1064]

28 US's and FCC's motion for leave to file response to motion to strike brief of the Department of Justice and bar further participation of de facto petitioner [75-1289]

June 4 Motion of Pulitzer Publishing Co., et al. for leave to withdraw intervention in consolidated proceedings for review of FCC order [75-1064]

7 Clerk's order granting respondent (US) motion for leave to file response to motion to strike brief of the Department of Justice and bar further participation as de facto petitioner [75-1289]

7 Response of US to motion to strike brief of the Department of Justice and bar further participation of the de facto petitioner [75-1289]

10 Joint appendix volumes 1 and 2 [75-1152, 75-1263, 75-1387, 75-1614, 75-1567, 75-1618, 75-1386, 75-1379, 75-1388]

21 Clerk's order that the motion of the Pulitzer Publishing Co. and KSD/KSD-TV, Inc. for leave to withdraw intervention in consolidated proceedings is granted and the Clerk is directed to remove the Pulitzer Publishing Co. and KSD/KSD-TV, Inc. from the dockets as an intervenor herein [75-1064]

22 Interventor's, (KNUJ, Inc., Michelson Media, Inc., and The Post Company) joint brief [75-1064]

23 NAB's brief [75-1289]

23 NAB's reply brief [75-1289]

23 The Brockway Company's brief [75-1614]

24 Intervenor's (American Newspaper Publishers Association) brief [75-1064]

24 Intervenors' (The Washington Post Company, Post-Newsweek Stations, Capital Area, Inc.) brief [75-1064]

24 ANPA's brief [75-1567]

24 ANPA's reply brief [75-1567]

24 Intervenors' (Belo Broadcasting Corporation and WHAS, Inc., Louisiana Television Broadcasting Corporation and The Washington Post Co. and Post-Newsweek Stations, etc.) joint reply brief [75-1064]

25 NCCB's brief [75-1064]

25 NCCB's reply brief [75-1064]

28 Respondent's (FCC) brief [75-1064]

July 13 Respondent's (US) motion for leave to file printed brief late [75-1064]

22 Clerk's order granting respondent's (US) motion for leave to file printed brief late [75-1064]

22 Respondent's (US) brief [75-1064]

Aug. 23 Clerk's order that Gray Communications System's Inc. motion to strike brief of the Department of Justice and bar further participation as de facto petitioner is denied [75-1064]

23 Clerk's order that consideration of the motion of FCC's and US's for an order prohibiting further prosecution of the case pending in another court is deferred pending oral argument on September 17, 1976 [75-1618]

27 FCC's consent motion to enlarge and allocate the time to present oral argument [75-1064]

Sept. 9 Joint motion to dismiss [75-1263]

14 Clerk's order that the FCC's and US's motion to extend and allocate time to present argument is granted and the following allot-

ment of time shall control oral argument; *40 minutes to be allocated among*: Petitioner ANPA; Petitioner NAB: Counsel representing individual Petitioners subject to the Divestiture requirement; *40 minutes to be allocated among*: Petitioner NCCB; Respondent U.S.A.; *40 minutes to be allocated among*: Respondent FCC; Intervenors The Washington Post Co., Post-Newsweek Stations, Capital Area, Inc.; individual parties shall promptly notify the Court of the identity of counsel to present argument and the total time to be taken within each allotment [75-1064]

17 Argued before CJ Bazelon; Wright and Robinson, CJ; The Court granted counsel for the petitioner in No. 75-1289 to lodge 4 volumes of Mass Communications in the U.S. - 1970 with the Clerk [75-1064]

17 Volumes of Mass Communications of the US - lodged in File Room [75-1064]

23 Per Curiam order granting joint motion to dismiss and the petition for review is dismissed. CJ Bazelon; Wright and Robinson, CJ [75-1263]

Nov. 26 Per Curiam order that the motion of the respondent, FCC, for an order restraining further prosecution by petitioner, Gray Communications Systems, Inc. is hereby denied without prejudice, however, to renewal as warranted by any change in present circumstances [75-1618]

1977

Mar. 1 Opinion for the Court filed by Chief Judge Bazelon [75-1064]

1 Judgment that the rulemaking order under review herein is affirmed only insofar as it operates prospectively; those portions of said order that have a retroactive effect and those portions dealing with existing combinations are vacated; and the record is remanded to the commission for adoption of rules not inconsistent with the opinion of this Court filed herein this date [75-1064]

16 FCC's motion for stay of mandate [75-1064]

17 NAB's statement in support of motion for stay of mandate [75-1289]

21 NCCB's partial opposition to motion for stay of mandate [75-1064]

23 FCC's reply to partial opposition to motion for stay of mandate [75-1064]

23 Respondent's (US) response to motion for stay of mandate [75-1064]

25 Motion of San Joaquin Communications Corp. for leave to submit opposition to motion for stay of mandate as an amicus curiae [75-1064]

29 FCC's opposition to motion of San Joaquin Communications Corp. for leave to submit opposition to motion for stay of mandate as an amicus curiae [75-1064]

Apr. 5 Opinion per curiam on motion to stay mandate. (ISSUED IN XEROX FORM BUT TO BE PRINTED AT A LATER DATE.) [75-1064]

5 Per Curiam order that the motion of the FCC is granted and the Clerk is directed not to issue the mandate in these cases prior to April 23, 1977 for the reasons set forth in the opinion of this Court released this day in xeroxed form, and in accordance therewith CJ Bazelon; Wright and Robinson [75-1064]

11 Per Curiam order amending opinion of April 5, 1977 [75-1064]

11 Printed copies of opinion of April 5, 1977 released this date [75-1064]

26 Certified copy of notice from Clerk, S.C., that writ of certiorari was filed on 4-22-77 in S.C. No. 76-1471 [75-1064]

May 6 Notice of filing petition for writ of certiorari in S.C. No. 76-1521 on May 2, 1977 [75-1064]

17 Notice of filing petition for writ of certiorari in S.C. No. 76-1595 on May 13, 1977 [75-1289]

18 Notice of filing of a petition for writ of certiorari in S.C. No. 76-1604 on May 16, 1977 [75-1064]

25 Notice of filing petition of writ of certiorari in S.C. No. 76-1624 on May 20, 1977 [75-1064]

June 6 Certified copy of notice from Clerk, Supreme Court that writ of certiorari was filed on May 27, 1977 in S.C. No. 76-1685 [75-1064]

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.

§152. Application of chapter.

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

§154. Federal Communications Commission.

* * * * * *

(i) Duties and powers.

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings.

The Commission may conduct its proceedings in such manner as will best conduct to the proper dispatch of business and to the end of justice. No commissioner shall participate in any hearing or proceedings in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the

request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

§ 301. License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States: or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, com-

munications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

§ 303. Powers and duties of Commission.

Except as other wise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall–

* * * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

§ 307. Licenses; allocation of facilities; terms; renewals.

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than threee years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

§309. Application for license.

(a) Considerations in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(d) Petition to deny application; time; contents; reply; findings.

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The Petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of

fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

[22 F.C.C. 2d 306] F.C.C. 70-310

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

Docket No. 18110

In the Matter of
Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations.

First Report and Order
(Adopted March 25, 1970)

By the Commission: Chairman Burch concurring in part and dissenting in part and issuing a statement: Commissioner Robert E. Lee dissenting: Commissioner Wells dissenting and issuing a statement.

1. The Commission has before it (1) a "Notice of Proposed Rulemaking" (33 F.R. 5315) adopted March 27, 1968, which commenced this proceeding and established an interim policy[1] for dealing with applications for broadcast station authorizations during the pendency of the proceeding: (2) a "Memorandum Opinion and Order" (12 F.C.C. 2d 912), adopted May 15, 1968, which denied petitions for reconsideration of

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[1] The interim policy is discussed in pars. 74-78, infra.

the interim policy, answered questions that had arisen concerning that policy, and clarified the proposed rule amendments contained in the notice; and (3) comments, reply comments, and other material filed in response to the notice.[2]

THE COMMISSION'S PROPOSAL

2. In this proceeding, the Commission proposed to amend the present multiple-ownership rules so as to prohibit the granting of any application for a broadcast license if after the grant the licensee would own, operate, or control two or more full-time broadcast stations within the market. The proposed amended rules would apply to all applications for new stations and for assignment of license or transfer of control except assignment and transfer applications filed pursuant to the provisions of section 1.540(b) or 1.541(b) of the rules (i.e., pro forma or involuntary assignments and transfers) and applications for [307] assignment or transfer to heirs or legatees by will or intestacy. Divestiture, by any licensee, of existing facilities would not be required. The remainder of this section sets the proposal in perspective.

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[2]Approximately 120 parties participated in the proceeding. They are listed in appendix A. If a party consisted of two or more entities making a joint filing, the names of the entities are listed under the name of the lead entity. The short designation of every party referred to in the present document appears in parentheses following the full name in appendix A. Participating parties include the three major networks, Mutual Broadcasting System, Inc., the National Association of Broadcasters, numerous State broadcasters associations, the All-Channel Television Society, the Association of Broadcasting Standards, Inc., the Community Broadcasters Association, Inc., individual and multiple owners and the Department of Justice.

3. The multiple-ownership rules of the Commission have a twofold objective: (1) Fostering maximum competition in broadcasting, and (2) promoting diversification of programing sources and viewpoints. The rules are essentially the same for the standard, FM, and television broadcast services and, respectively, appear in 47 CFR §§73.35, 73.240, and 73.636 (1969). Each of these sections is divided into two parts, the first of which is known as the duopoly rule, and the second of which is often called the concentration of control rule.[3]

4. The concentration of control rules aim at achieving the aforementioned twofold objective nationally and regionally by providing that a license for a broadcast station will not be granted to a party if the grant would result in that party's owning, operating, or controlling more than a specified number of stations in the same broadcast service. For AM the number is 7, for FM it is 7, and for TV it is 7, with no more than 5 being VHF. The rules also provide that a grant will not be made, even though it would not result in exceeding these specified maximums, if it would result in undue concentration of control contrary to the public interest (some of the criteria for making such a determination are contained in the rules).

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[3]For a brief history of the duopoly and concentration of control rules, see *Multiple Ownership* (docket No. 14711), 27 F.R. 6846, at par. 3 (1962); *Multiple Ownership* (docket No. 16068), 30 F.R. 8166, at par. 3 (1965), 33 F.R. 3078, concurring opinion of Commissioner Loevinger in which Commissioner Wadsworth joined (1968); *Network Broadcasting*, H.R. 1297, 85th Cong., 2d sess., 553-599 (1958). Recent rule amendments not covered in the foregoing appear in *Multiple Ownership of AM, FM, and TV Stations*, 13 F.C.C. 2d 357 (1968). A pending proposal to amend the rules with regard to bank holdings of broadcast stocks appears in *Multiple Ownership* (docket No. 18751), 34 F.R. 19032 (1969).

5. While the concentration of control rules aim at attaining the twofold objective nationally and regionally, the duopoly rules are designed to attain it locally and regionally by providing that a license for a broadcast station will not be granted to a party that owns, operates, or controls a station in the same broadcast service a specified contour of which would overlap the same contour of the station proposed to be licensed. (For AM stations the predicted or measured 1-mv./m. groundwave contours must not overlap: for FM, the predicted 1-mv./m. contours; for TV, the predicted grade B contours.) In broader language, the duopoly rules prohibit a party from owning, operating, or controlling more than one station in the same broadcast service in the same area. However, they do not prevent a single party from owning, operating, or controlling more than one station in the same area if each station is in a different service. Hence, a single licensee often has a standard, an FM, and a television broadcast station in one community.

6. The proposal in this proceeding is in essence an extension of the present duopoly rules, since it would proscribe common ownership, operation, or control of more than one unlimited-time broadcast station in the same area, regardless of the type of broadcast service involved.[4]

THE RULES ADOPTED HEREIN

[308] 7. All but four of the commenting parties opposed the proposal. Some opponents urge that if the Commission, over the objections they raise, should

[4]The proposal applies to commercial stations and not to noncommercial educational stations.

decide to adopt rules they should not be the ones proposed in the notice but a modification thereof (various modifications are suggested). The four parties supporting the proposal believe that it does not go far enough and urge the Commission to take various further steps. We have carefully considered all of the comments and other material filed in this proceeding and, for the reasons set forth hereinafter, are of the view that it is in the public interest to adopt the rules contained in appendix B hereto. With some exceptions, they are the same as those which we proposed in the notice as clarified by the memorandum opinion and order. A brief description of the rules follows.

8. The memorandum opinion and order (par. 1, supra) noted that since the rules proposed in the notice were in essence an extension of the present duopoly rules, the Commission would (without intending to prejudice the meaning of "market" in any rules that might be adopted) use the overlap concept in the present duopoly rules for purposes of administering the interim policy. As previously stated (par. 5, supra), those rules proscribe overlapping of specific service contours of commonly owned stations. We determined that for the interim policy if granting an application would result in one party's owning, operating, or controlling two or more full-time broadcast stations with overlap of those contours, the stations would be considered to be in the same market and the application would not be acted on until the termination of this proceeding. Thus, for example, if an application were for a TV license and the grade B contour of the proposed station would overlap the 1-mv./m. contour of a commonly owned, operated, or controlled full-time aural station, the application would be held in abeyance until the termination of this proceeding.

9. The concept of market in the rules adopted today differs from that used in administering the interim policy. The new rules retain the previous duopoly rules intact, that is, they proscribe common ownership of television stations if the grade B contours overlap, of AM stations if the 1-mv./m. contours overlap, and of FM stations if the 1-mv./m. contours overlap. However, in extending the duopoly rules to proscribe common ownership of stations in different broadcast services in the same area, the standard is different: Common ownership of a TV station and an AM station is prohibited if the grade A contour of the former encompasses the entire community of license of the latter, or if the 2-mv./m. contour of the latter encompasses the entire community of license of the former. The same principle applies to FM stations in relation to TV or AM stations, with the 1-mv./m. contour of the FM station being the criterion, for example, if the 1-mv./m. contour of the FM station encompasses the entire community of license of an AM station or the 2-mv./m. contour of the AM station encompasses the entire community of license of the FM station, common ownership of the stations is not permitted. The aforementioned encompassment standard applies whether the stations in question are licensed to serve the same community or different communities.

[309] 10. The new rules are phrased in terms of proscribed overlap, for stations in the same broadcast service (that is, the previously existing duopoly rules), and proscribed encompassment, for stations in different broadcast services: they do not use the term "market." However, since the proposal in the notice used the term and invited comments on how it should be defined, and since the comments therefore use it, the following

discussion herein uses it also. When used, of course, it means stations with the proscribed overlap or encompassment.

11. With one exception, the rules adopted provide that no license for an AM (daytime or full time), FM, or television broadcast station will be granted to a party that already owns, operates, or controls one or more full-time stations which, if the grant were made, would be in the same market as the proposed station. The exception: The licensee of a class IV AM station which is licensed to serve a community of less than 10,000 population will be permitted to obtain a license for an FM station even though the two stations would be in the same market. (This would not be permitted, however, if the FM station would also be in the same market as a commonly owned, operated, or controlled TV station.)

12. The licensee of a daytime-only AM station not having a license for an FM station in the area may obtain a license for an FM station that would be in the same market. Note, however, that according to the statement in the previous paragraph, an FM licensee could not obtain a daytime-only AM license in the same market.

13. A party having no broadcast stations in a community may obtain a license for only one station there—TV, AM (daytime only or full time), or FM. However, such a party may obtain licenses for an existing AM-FM combination in the same market by way of assignment or transfer if a proper showing is made by the seller that for economic or technical reasons the stations cannot be sold and operated separately.

14. No divestiture, by any licensee, of existing facilities will be required at this time. The rules will apply to all applications for new stations and for assignment of license or transfer of control except assignment and transfer applications filed pursuant to the provisions of section 1.540(b) or 1.541(b) of the rules (that is, pro forma or involuntary assignments or transfers) or applications for assignment or transfer to heirs or legatees by will or intestacy that would not result in violation (for example, the licensee of an existing full-time station could not, as heir or legatee, be the assignee or transferee of other stations that would be in the same market as the existing station). Applications involving television satellite stations and aural stations in the same market will be handled on a case-by-case basis. With some exceptions, for example, applications for increases in power by class IV AM stations, the rules will apply to applications for major changes in facilities, but certain applications of that type (and of all other types) pertaining to UHF stations will be handled on a case-by-case basis.

15. An examination of notes 7 and 8 in the present duopoly rules and notes 7 and 8 in the new rules in appendix B will show that the topics mentioned in the preceding paragraph generally are covered therein and that the latter notes merely modify the former to embrace the broader concept of duopoly contained in the new rules.

[310] THE BASIS AND PURPOSE OF THE RULES

16. Basic to our form of government is the belief that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the

welfare of the public." (*Associated Press v. United States*, 326 U.S. 1, 20 (1945).)[5] Thus, our Constitution rests upon the ground that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Justice Holmes dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

17. These principles, upon which Judge Learned Hand observed that we had staked our all, are the wellspring, together with a concomitant desire to prevent undue economic concentration, of the Commission's policy of diversifying control of the powerful medium of broadcasting. For, centralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use.

18. It is accordingly firmly established that in licensing the use of the radio spectrum for broadcasting, we are to be guided by the sound public policy of placing into many, rather than a few hands, the control of this powerful medium of public communication. ("Amendment of Sections 3.35, etc.," 18 F.C.C. 288 (1953), affirmed *United States v. Storer Broadcasting*

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[5] This is because "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." (*United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y., 1943), affirmed 326 U.S. 1 (1945).) Thus, our rules are not based upon the proposition disputed by Prof. George H. Litwin, in his study submitted on behalf of the NAB, that common ownership within one medium or of more than one medium results in any particular degree of control of what people think and how they act.

Co., 351 U.S. 192 (1956); 99 U.S. App. D.C. 369, 240 F. 2d 55 (1956).) This basic principle, enforcible in ad hoc proceedings or through rulemaking, applies to the judgment of whether an individual application should be granted as well as to the comparison of competing applicants. (*United States v. Storer Broadcasting Co., supra; Clarksburg Publishing Co. v. Federal Communications Commission*, 96 U.S. App. D.C. 211,225 F. 2d 511 (1955); *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 89 U.S. App. D.C. 13, 189 F.2d 677 (1951), cert. den. 342 U.S. 830; *Plains Radio Broadcasting Co. v. Federal Communications Commission*, 85 U.S. App. D.C. 48, 175 F. 2d 359 (1949).[6]

19. It is true that section 315 of the Communications Act, the Commission's Fairness Doctrine, and the Commission's rules relating to personal attacks and station editorials on candidates for public office all contribute substantially toward insuring that, whatever a station's ownership, and the views of the licensee, each station will present conflicting viewpoints on controversial issues. However, this is not enough. For, as was stated in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 89 U.S. App. D.C. 13, 19, 189 F.2d 677, 683 [311] (1951), cert. den. 342 U.S. 830, the key to the question is the public interest in acquiring information from diverse and antagonistic sources, and news communicated to the public is subject to selection and, through selection, to editing, and * * * in addition there may be diversity in methods,

[6]Such consideration is not the arbitrary discrimination which has been said in a dictum, *Stahlman v. Federal Communications Commission*, 75 U.S. App. D.C. 176, 126 F. 2d 124 (1942), to be beyond the Commission's legitimate powers.

manner and emphasis of presentation. This is true not only with respect to news programs, but also the entire range of a station's treatment of programs dealing with public affairs.

20. As pointed out above, the governing consideration here is power, and power can be realistically tempered on a structural basis. It is therefore no answer to the problem to insist upon a finding of some specific improper conduct or practice. The effects of joint ownership are likely in any event to be so intangible as not to be susceptible of precise definition. The law is clear that specific findings of improper harmful conduct are not a necessary element in Commission action in this area, and that remedial action need not await the feared result.

21. Application of the principles set forth above dictates that one person should not be licensed to operate more than one broadcast station in the same place, and serving substantially the same public, unless some other relevant public interest consideration is found to outweigh the importance of diversifying control. It is elementary that the number of frequencies available for licensing is limited. In any particular area there may be many voices that would like to be heard, but not all can be licensed. A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel

for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated. We see no existing public interest reason for being wedded to our present policy that permits a licensee to acquire more than one station in the same area.[7]

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[7]MBS states its conviction that it can only become stable and viable as a network by having AM, FM, and perhaps TV, stations in major markets. It avers that it presently owns no broadcast stations, that it has publicly announced its intention to acquire AM, FM, and TV stations, and that the rule would prevent it from having more than one station in a market. At the same time, the networks with which it competes would not be divested, so that MBS could not achieve parity with them. It argues that the importance of competition among networks has been recognized in the *KOB* case (*American Broadcasting-Paramount Theatres, Inc. v. FCC*, 108 U.S. App. D.C. 83, 280 F. 2d 631 (1960), 345, F. 2d 954 (1965) and that under the decision in that case the Commission is required to provide comparable facilities for all networks. Hence, as a matter of law, MBS says, the Commission could not apply the rules, if adopted, to MBS.

Adoption of rules herein does not mean an end to a flexibility that would, for example, permit the Commission to allow MBS to acquire more than one station in a market, for as the Supreme Court said in *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943), sustaining the chain broadcasting regulations:

"The Commission * * * did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' "

And *Storer, supra*, in sustaining the concentration of control portion of the multiple ownership rules, quoted that statement from *National Broadcasting Co.* and went on to say (at 205):

"That flexibility is here under the present §309(a) and (b) and the FCC's regulations * * * We read the Act and Regulations as providing a 'full hearing' for applicants who have reached the existing limit of stations, upon their presentation of applications

[footnote continued]

[312] 22. It is true that many communities have multiple broadcast and other communications media. But it is also true that the number of daily newspapers has been decreasing, a fact which increases the significance of the broadcast medium. Material attached to the NAB reply comments shows the number of cities with commercially competing local dailies to be 45 in 1968. In 1962 the figure was 61.[8] In our view, as we have made clear above, there is no optimum degree of diversification, and we do not feel competent to say or hold that any particular number of outlets of expression is enough. We believe that the increased amount of broadcast service now available also forms the basis for the conclusion that, with the exceptions mentioned later herein, it is no longer necessary to permit the licensing of combined operations in the same market, as was the case in the early days of broadcasting, in order to bring service to the public. It

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conforming to Rules 1.361(c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more."

It is not clear that MBS could not achieve a competitive posture through the ownership of the permissible number of AM, FM, and TV stations in separate markets. However, MBS would be entitled to a full hearing if it filed applications with requests for waiver of the new rules setting out adequate reasons why it should be permitted to obtain more than one station in an area.

A full hearing could similarly be obtained by ABC, which argues that its competitive position could be improved by merging with a larger company, but that the advantages of merger would be nullified by the new rules which would require it to divest of all but one of its owned and operated stations in each market it is licensed to serve in order to obtain approval of the merger request.

[8]Raymond B. Nixon, "Trends in U.S. Newspaper Ownership: Concentration with Competition," Gazette, vol. XIV, No. 3, 1968, pp. 8-9.

is urged that the Commission not only permitted but encouraged AM licensees to become TV licensees in their own area, and again, later, to acquire FM stations in their area, that it is inequitable now not to permit such common ownership for it robs such owners of the fruits of their risk taking, and that the rules will hinder FM and UHF development. At the time that such encouragement was given to AM licensees, we considered that the objective of encouraging the larger and more effective use of radio was overriding, for TV and FM channels were lying unused. But conditions have changed, and we are obligated to change the priority of our objectives, in the public interest.

23. It is said that the good profit position of a multiple owner in the same market results in more in-depth informational programs being broadcast and, thus, in more meaningful diversity. We do not doubt that some multiple owners may have a greater capacity to so program, but the record does not demonstrate that they generally do so. The citations and honors for exceptional programing appear to be continually awarded to a very few licensees—perhaps a dozen or so multiple owners out of a total of hundreds of such owners. Although multiple owners may have more funds for experimental programing and innovation, there has been no showing that the funds are spent for these purposes. However, accepting arguendo that some multiple licensees do a better programing job in this respect than do single station licensees, we are not reducing the holdings of multiple licensees. Moreover, the further notice being issued today, which would require divestiture over a period of time, would not reduce the financial strength of multiple owners that presumably leads to an ability to engage in such

programing. Rather, it would maximize the number of different licensees in each market but would permit the purchase by divested licensees of a similar number of stations in other markets.

[313] 24. Finally, the argument is made that rules prohibiting a present owner of a single full-time station in a community from obtaining additional stations there would be illegally discriminatory because they would prevent him from competing effectively with combination owners in the area and would make a privileged class out of combination owners. Therefore, it is argued, if the rules are adopted, divestiture should be required. The decision to refuse to permit additional local concentration in the future does not necessarily require that existing situations all be uprooted. On an overall basis, there has been no showing that single stations cannot compete effectively with combination owners. We are herewith instituting new rulemaking to consider the need for divestiture and will there consider the arguments in its favor.[9] Individual cases can of course always be dealt with where necessary to preserve adequate competition. But a line must be drawn somewhere, and the application of new policy to new applications is a clearly reasonable approach.

25. Although the principal purpose of the proposed rules is to promote diversity of viewpoints in the same area, and it is on this ground that our above discussion is primarily based, we think it clear that promoting diversity of ownership also promotes competition. A number of comments were made with respect to the competitive advantage that licensees of coowned stations have over the single station licensee in the same

[9] See par. 68, infra.

area. Thus, the Department of Justice points out that AM, FM, and TV are for many purposes sufficiently interchangeable to be directly competitive, and that competitive considerations support adoption of the rules. It mentions that one effect of combined ownership of broadcast media in the same market is to lessen the degree of competition for advertising among the alternative media. Another, it is averred, is that a combined owner may use practices which exploit his advantage over the single station owner. These practices may include special discounts for advertisers using more than one medium, or cumulative volume discounts covering advertising placed on more than one medium. Mount Wilson, Freddot, and Lunde present similar arguments about such practices.[10]

26. Opponents of the proposed rules state that there is no hard evidence that multiple licensees generally engage in practices of this kind. CBS says that the argument about such practices provides no justification for the rules for the Commission long ago addressed itself to the matter (*Combination Advertising Rates*, 24 Pike & Fischer, R.R. 930 (1963)), and there is no significant problem in this area. A study commissioned by WGN and others purports to find no statistical evidence that revenue yields for multiple owners are significantly different from yields of single-station

[10]The topic is outside the scope of this docket. If rules were contemplated, they would have to be handled in a separate proceeding. The same would be true of the question of call letters. Comments herein suggest that the use of identical letters for commonly owned stations in the same community has anticompetitive effects and that rules should be adopted requiring the use of separate call letters. A petition for rulemaking on this subject (RM-1451), filed May 5, 1969, by Lincoln Broadcasting Co., is pending.

owners (using revenue per thousand audience as an indication of superiority). However, we note that it does show significantly higher revenue yields for multiply owned radio stations, [314] particularly in their national spot business, which appears to hold true in all sizes of markets (at pp. 17-20 of the study).

27. NBC, in its reply comments (directed against the Justice comments), argues that the market shares of the largest owners in the larger markets are well below the points which are generally considered danger points by antitrust standards. The basic data on market shares which it presents, in spite of the conclusion of NBC, do show high concentration in some markets. For example, in Washington, D.C., if the market is considered to be only the broadcast media, the top three owners have a 64-percent market share; if the market is considered to be broadcast and newspaper media, the top two owners have a 68-percent share.[11] In any event, we find that distributing ownership more broadly will strengthen competition by removing the potential of competitive advantage over single station owners. There is no need to find specific abuses in order to provide a healthier competitive environment of benefit to smaller licensees.

28. In sum, as we have stated before (18 F.C.C. 288,291-2):

> It is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the

[11]NBC obtains a much smaller market share figure by using the revenue of the broadcast owner, excluding newspaper revenues, but dividing it by the base of total broadcast and newspaper advertising revenue in the market (NBC reply comments, p. 13).

operation of broadcast stations by a small and limited group of licensees. The vitality of our system of broadcasting depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service. Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest.

DISCUSSION OF THE RULES

Stations in the same "market"

29. The notice proposed rules that would limit common ownership of full-time broadcast facilities in the same market, but did not define the latter term. The memorandum opinion and order announced what "market" would mean for purposes of administering the interim policy (see par. 8, supra) and stated that the interim usage would not prejudice ultimate decisions on the meaning of "market" in any rules which might be adopted in this proceeding.

30. Although comments were invited on what "market" should mean if the proposed rules were adopted, few were received. The most appealing suggestion was that a "market" should be a standard metropolitan statistical area (SMSA) as defined by the 1960 or subsequent censuses and that the rules should apply to stations licensed to any community within the same SMSA. We have given consideration to use of the SMSA but reject it because although it might have some

advantages, it has drawbacks as well. For example, not all communities are located within an SMSA. If an SMSA "market" were used, it would be necessary to use a separate standard for communities lying outside an SMSA. We think it best to have a fixed standard that can be applied uniformly in all cases.

[315] 31. Paragraphs 9 and 10 set forth the standard used in the rules adopted today. (They also point out that the rules are worded in terms of overlap or encompassment and do not use the term "market." The deliberate omission is intended to avoid confusion since "market" is given various meanings in the broadcast industry.) The new encompassment standard to be applied to cases involving commonly owned stations in different broadcast services is less restrictive than the standard used for such stations under the interim policy. For example, under the interim policy if the 1-mv./m. contour of an FM station licensed to serve one community overlapped the grade B contour of a TV station proposed to be licensed to serve another community, the stations were considered to be in the same market. But under the new rules, in such a case the 1-mv./m. contour of the FM station must not only overlap the grade A contour of the TV station (as contrasted with the grade B contour) but must encompass the entire community of license of the TV station. In other words, the stations must be closer together in order to fall under the proscription against common ownership.

32. In arriving at a practical criterion for commonly owned stations in different broadcast services, we decided that the overlap standard of the interim policy went further than we thought necessary to achieve the desired ends of the proposed rules. We are of the view

that the concept of a usable signal for a primary service from each of two stations (in different broadcast services) to the principal community of one of them should be determinative. However, we still believe that for stations in the same broadcast service the previously existing overlap standard should apply and as paragraphs 8 and 9 indicate, the new rules therefore retain a proscription against overlap of TV grade B contours, AM 1-mv./m. contours, and FM 1-mv./m. contours.[12]

33. A final point about the criteria of the new rules should be mentioned. It pertains to major changes. Under the new rules, as under the previous duopoly rules, increases in overlap of specified contours between commonly owned stations in the same broadcast service are proscribed. Thus, for example, an application to increase power of one of two commonly owned AM stations with overlapping 1-mv./m. contours would be prohibited since this would result in increased overlap. However, for commonly owned stations in different broadcast services the standard is not one of contour overlap but, rather, one of community encompassment—a standard aimed at preventing a single owner from bringing more than one primary service to a community of license. Hence the method of treating major changes will be different. The new rules are silent on the point, but we here announce that if proscribed encompassment already exists and if after grant of an application for major change it would still exist, the rules will not bar the grant.

34. The concept is best illustrated by an example: Assume that an owner is licensed to serve community A

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[12] For explanation of the basis of this retained standard, see "Multiple Ownership" (docket No. 14711), 29 F.R. 7535 (1964).

with an FM station and community B with an AM station, and that the 2-mv./m. contour [316] of the latter station just barely encompasses all of community A. Grant of an application for increase in power of the AM station would result in the 2-mv./m. contour of the station easily encompassing community A and going quite some distance beyond it. Such a change would not be barred by the rules since both before and after the change the situation would still be one in which a single owner was bringing more than one primary service to the community (albeit after the change community A would be receiving a stronger signal). The principle is not limited to power changes but would apply to all major changes, for example, to changes in transmitter site. In contrast to the foregoing result, if the stations in community A and B had both been in the same broadcast service (that is, AM) and had previously existing proscribed overlap, the power change would be denied since it would result in increased overlap.

Characteristics of different "markets"

35. A widely held view of opponents is that the proposed rules are too sweeping and not tailored to the specific requirements of particular situations. It is said that all markets are not alike and that the rules should treat different markets differently. Some urge that large markets should be exempted because of the great number of independently owned mass media serving them. Others urge exemption for small markets because viability there often depends on having combined operations, and point to the fact that the Commission recognized financial difficulties in smaller markets when it exempted them from the AM-FM duplication rules.

Still others proposed that if a market has a specified number of "voices," it be exempted on the ground that it presumptively has an adequate amount of diversity so that the rules are not needed. And some suggest that weights or points be given for various types of media and that a single owner be permitted to have only a specified number of points in a market.[13]

36. The Litwin report (note 5, supra) suggests that across-the-board rules limiting common ownership would be detrimental to the public interest in the majority of cases. We find weaknesses in the study so greatly affecting the conclusions reached therein as to render them of little value in our deliberations.

37. Thus, for example, the study relies largely on statements of interviewees for obtaining the information on which most of its conclusions are based. The technique of relying on statements of interviewees rather than on more solid factual data is open to question. For example, it would appear the better course to ascertain the hours of news broadcast per day by a station by examining the last renewal application or the station logs rather than inquiring of media personnel. Admittedly, some of the information gathered from the interviewees would, by its nature (for example, opinions about the amount of influence of various media personnel on media policy), not be

[13] Air Trails suggests an incentive plan that might encourage owners to break up local combinations by permitting them to own a greater number of stations nationally than is permitted under present rules. This would increase diversity locally at the expense of increasing concentration of control nationally. We think it more in the public interest to adopt rules that would increase local diversity while at the same time not increasing national concentration to the degree suggested.

available in factual data, and could only be obtained by Interviews. How-[317]ever, a weakness of any interview situation is that the interviewee, intentionally or unintentionally, may not say what is actually true. It does not appear that any attempt was made to ask questions designed to provide a crosscheck on some of the answers given.

38. The study matched markets demographically, chose markets with close to the same number of media outlets in each media category, and so on, in an effort to show how singly owned stations differ from stations which are commonly owned with other stations in a single market. If differences between commonly owned and singly owned stations are to be attributed to the ownership factor one must be sure that the media compared differ little or not at all in other important respects. It would appear that the study fails to meet this test. For example, it shows the number of media personnel interviewed in the commonly owned and singly owned categories in each market, but does not indicate with what specific media they were associated. At the request of the staff, Dr. Litwin submitted a letter which indicated that in the commonly owned sample (covering six markets used in the study) there were nine VHF and one UHF TV stations all of which were network affiliated. In the singly owned sample there were five TV stations—two VHF affiliates, one VHF independent, and two UHF independents. The total profits (before taxes) of the TV stations in the former group were $12.7 million in the 1968 as compared to $3.9 million for the latter group in the same year. Conclusions reached about these stations could just as well be attributed to their profit position as to their being commonly or singly owned. One could

argue that even if a station were singly owned, if it were a VHF station in a large market with a CBS affiliation it would be in an excellent position to provide excellent news and public affairs service to the public, a type of programing which Litwin suggests is more likely to be broadcast by commonly owned stations. Moreover, some singly owned stations and some of the stations commonly owned in the same market were owned by parties who also owned stations elsewhere in the Nation, but the effect of this factor was not examined.

39. Another weakness is that although in many instances statistically significant differences were the basis for statements of how commonly owned and singly owned operations differ, often statements were made that were based on differences that were not indicated to be statistically significant in the tables contained in the report.

40. Finally, some assumptions of the study are open to question. For example, it assumes that singly owned stations go hand in hand with lack of financial resources; that a single owner's personal involvement in operating his stations is contrary to the public interest; and that editorial stands in highly controversial areas, which it finds single owners have more of a tendency to take, are inflammatory.

41. We agree with those who say that rules should be reasonably related to the ends sought, and believe that the rules adopted herein are. They represent a particularization of our conception of the public interest (*National Broadcasting Co., supra*, at 218), and deal with a recurring problem which we believe is best dealt with by general rules. Though they are general in nature, they take into account the precarious positions

of many existing FM stations, the lack of aural [318] service in small markets with class IV stations, the needs of some daytime AM stations for nighttime service that will benefit a community, peculiar problems of satellite television stations, the policy of fostering UHF development, and other matters.

Comparability of A.M., F.M. and TV[14]

42. Opponents of the proposal aver that the three services are not comparable and therefore that the rules are inapt since the different services have different audiences in kind and size and eliminating common ownership in the same market does not mean that individual members of the public will receive more voices.

43. What opponents appear to be saying is that if, for example, one owner has three stations in the same market and each serves the same audience, then if the stations were sold and became separately owned that audience would be exposed to three voices instead of one and diversity of viewpoints would have been promoted. However, according to their argument, if each of the stations serves a different audience, and they say each would, then having three separate owners instead of one merely means that although each audience would be exposed to a different voice, it would still be just one voice, and the listeners would have no increased diversity.

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[14]This section deals only with comparability of the services with regard to their broadcasting of diverse viewpoints. As to comparability in terms of economic competition, see pars. 25-28 supra.

44. The rules are designed to prevent any possible undue influence on local public opinion by relatively few persons or groups. They can do this by either bringing more voices to the same audience, or by assuring that no one person or entity transmits its single voice to each of three audiences. Assuming separate audiences for each of the three services, a commonly owned AM-FM-TV combination sends a single voice to the sum of all three audiences which might well constitute most of the community. With three separate owners, no one person or entity could so reach the entire community. Each would reach a part of it, and this would act to reduce possible undue influence. Insofar as there is overlap of audiences of the three services, separate ownership, of course, would being more voices to the overlapping audiences. Such overlap may be substantial.

FM and UHF development

45. Some parties urge that the rules would be contrary to the policy of fostering UHF development, since often the local AM licensee might be the only one willing to undertake to build a UHF station, so that may be the only way that UHF may develop in many communities. Moreover, in many communities, we are told, independent FM operation is not viable. If this is the case, it is argued, it is difficult to see how the rules would achieve diversity. Channels would lie fallow that otherwise might have been used by licensees of other local stations. Moreover, when AM-FM combinations are sold, there may often be no buyer for the FM station, with the result that it would go off the air. This, opponents contend, would be unfair to AM licensees who went into FM operations in the same community

as the result of Commission encouragement since it would deny them the fruits of their risk [319] taking by depressing property values at the time of sale. Consequently, it is argued, many might be disinclined to enter into new areas of communications in the future, thereby slowing development in new areas, and this would be contrary to the public interest. It is also pointed out that the AM-FM nonduplication rule recognized that AM-FM combinations in small markets are not in a position to program even 50 percent separately, yet the rules proposed herein would not only require 100-percent separate programing, but separate ownership as well.

46. As opposed to the foregoing, supporters of the proposal hold that the clear effect of combined ownership of stations in the same market is to reduce diversity of news and information sources available and to lessen the degree of competition for advertising: that separate ownership of AM and FM stations would require completely separate programing instead of the amount presently permitted under the non-duplication rules and that this would give the public a greater choice of programing; that it is difficult to imagine that a dual owner would carry conservative editorials on its AM station and liberal editorials on its FM station—separate owners give more views; and that common ownership of AM and FM stations restricts FM development.[15]

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[15] Several parties suggest amendment of the AM-FM nonduplication rules in a way that would require more nonduplicated programing. See "Broadcast Station Assignment Standards" (docket No. 18651), 19 F.C.C. 2d 472, 488 (1969), where we said that a document dealing with this matter will be issued in the near future.

47. We find the arguments of opponents persuasive. Surely independent UHF stations still need all the support they can receive. Although AM stations have shown little inclination in the past to build or acquire such UHF stations,[16] combinations of UHF with AM stations, or, should the occasion arise, with FM stations or with AM-FM combinations, will be dealt with on an ad hoc basis, as indicated in note 7 to the revised section 73.636.

48. With respect to existing AM-FM combinations in the same area, we recognize that in most cases the operations may be economically and/or technically interdependent. Financial data reported by FM stations indicate that they are generally losing money.[17] We are, therefore, in the rules adopted today, permitting assignments or transfers of combined AM-FM stations to a single party where a showing is made that establishes the interdependence of the stations and the impracticability of selling and operating them as separate stations. Although this will not foster our objective of increasing diversity, it will preclude the possible demise of many FM stations, which could only decrease diversity.[18]

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[16] We note only two cases of UHF-radio combinations in the top 50 markets (Department of Justice comments, app. A).

[17] Operating statements showing revenues, expenses, and income are reported to the Commission by FM stations which operate independently of an AM station in the same community. Reports of combined AM-FM stations do not show income for the FM separately. In 1968, of the 433 independent FM stations reporting, only 148 showed a profit. Their average profit, before Federal income taxes, was $15,308. The average loss for the other 285 stations was $21,599.

[18] In the light of our view, expressed at various times in recent years, that FM should not be an adjunct or supplement of

[footnote continued]

49. However, although we take the aforementioned step as to existing AM-FM combiantions, licensees of FM stations or of full-time AM stations (with the exception of certain class IV's) will not be permitted to [320] obtain a second aural authorization in the same market. We believe that there is no general shortage of aural service, and have decided to prevent any further concentration of ownership of such stations. The excepted class IV stations are those in markets with a shortage of local annual service, as explained below. For reasons also set forth below, daytime-only AM stations will be permitted to obtain FM licenses.

Exemptions—daytime AM and some class IV AM stations

50. Our proposal in the notice, as clarified in the memorandum opinion and order, was that a daytime AM station could obtain a license for a full-time station in the same market and conversely, a full-time station could obtain a license for a daytime AM station. However, no full-time station could obtain a license for another full-time station in the market.

51. The rules we adopt provide that a daytimer may obtain an FM station in the same market. But no FM station will be permitted to acquire a daytime AM station. Moreover, and contrary to the proposal, licensees of class IV AM stations in communities under 10,000 will be permitted to acquire an FM station.

AM, but that both AM and FM should be integral parts of a total aural service, it is our intent to study further the entire questions of combined AM-FM ownership in the same area. This will be done in docket No. 18651 (note 19, infra) or otherwise.

52. Arguments are made that all class IV stations should be treated like daytime stations and permitted to obtain licenses for FM stations in the same market because class IV stations have very limited nighttime coverage and therefore resemble daytimers. A similar argument is made for full-time stations with DA patterns restricting nighttime coverage. Additionally, it is argued that daytimers could also be nighttimers if they were willing to invest in night directional facilities, and therefore should not be given preference over those who have made such investments, with respect to the right to acquire FM facilities.

53. It is said that in establishing the table of assignments for FM channels (docket No. 14185), the third and sixth priorities were to provide each community with at least one FM station, especially where the community has just a daytime-only or local class IV station; and to provide a substitute for AM operations, which, because they are daytimers or suffer serious interference at night, are marginal from a technical standpoint. It is said that the Commission obviously envisioned that, where practicable, daytime-only and class IV stations would have an FM channel available to them. We are told that the new rules would for the first time make a distinction between the two types of stations.

54. It is also averred that the Commission has encouraged AM-FM combinations as an alternate means of providing aural broadcast service if daytimers could not provide adequate service within the restrictions of the AM rules, or to overcome service losses caused by interference resulting from presunrise operation of daytime-only stations.

55. Against the aforementioned argument for class IV exemption, Mount Wilson, a single FM station licensee and a supporter of our proposal, states that even with reduced nighttime coverage, the competitive influence of such stations can be far reaching, and that to exempt class IV's would impede the development of FM (see par. 46, supra).

56. Citizens Committee, also a supporter, takes the position that radio is now primarily a daytime medium so that it is important that efforts be made to achieve diversity of programing, especially in small communities where local issues may be covered only by radio. It therefore urges that consideration be given to not exempting daytime AM stations from the rules.

57. It cannot be denied that past encouragement has been given to AM licensees to engage in joint AM-FM operations. However, as stated elsewhere (par. 22, supra), changing conditions require a re-evaluation of objectives, which may result in rule changes.[19] For example, for a long time 100 percent duplication of AM-FM programing was permitted. However, that was changed by the adoption of the AM-FM nonduplication

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[19]The case of those arguing that the Commission has encouraged such joint operations may be overstated. For example, they cite our statement in the report and order which established new AM assignment standards in 1964, where we said, in presenting reasons for restricting the construction of new nighttime AM stations, that "* * * such needs for nighttime aural service as do exist may be met far more efficiently by FM stations. * * *" ("AM Assignment Station Assignment Standards" docket No. 15084, 2 Pike & Fischer, R.R. 2d 1658, 1672 (1964).) This statement does not necessarily mean that the FM stations should be operated by AM licensees in the same community. Similarly, the third and sixth priorities in docket No. 14185, mentioned above, did not necessarily have that import.

rules. It is noted that at the time that those rules were adopted, we referred to our previously expressed view that separate ownership of AM and FM stations in the same community was a desirable long-range goal that was not being gone into at that time in view of the fact that the subject of possible general revisions of the multiple ownership rules was then under study (Id., at 1678).

58. For public interest reasons previously mentioned, we have fashioned the rules to give special consideration to the sale of AM-FM combinations. Additionally, for reasons mentioned below, class IV AM stations in communities with less than 10,000 population, and all daytime AM stations, will be permitted an FM station in the same community. Beyond this we are not prepared to go in the matter of dual ownership of AM and FM stations.

59. We now turn to the exemption of daytime AM stations. As was proposed, such stations will be permitted to obtain FM licenses. This is done in the interest of bringing nighttime service to areas served by daytimers, thereby adding a voice for nighttime listeners.[20] We think this purpose outweighs the argument of Citizens Committee that daytime AM stations should not be exempted.

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[20]Not only will we permit daytimers to use FM to bring nighttime serve, but in many cases we shall require them to use FM if they wish to provide such service. In a notice of proposed rulemaking and notice of inquiry looking toward revision of the AM station assignment standards ("Broadcast Station Assignment Standards" docket No. 18651, 19 F.C.C. 2d 472 (1969)), we have proposed rules (and stated reasons in support thereof) that would require a daytimer seeking new nighttime AM service to show that there is available in his community no commercial FM channel on which he could operate a station (at 475-6).

60. The reasons for permitting daytimers to obtain FM do not apply in reverse. Therefore, contrary to the proposal, the rules do not permit an FM station to obtain a daytime AM license since the FM station is already giving both day and night service.[21] Similarly, we do not generally permit full-time AM stations, whether class IV or stations with DA patterns restricting nighttime coverage, to obtain authorizations for FM stations in the same area. Such AM stations are already licensed to serve both day and night. Though they may have restricted [322] service areas at night, and though they might, by using FM, bring an additional voice to areas not now served by them at night, it would be at the expense of having their voice over two channels in their present daytime and nighttime service areas. We are willing to permit a daytimer to have two daytime channels (AM and FM) and one nighttime channel (FM) in the interest of adding a nighttime voice. But we are unwilling to permit full-time AM stations to have two daytime channels (AM and FM) serving the community of license and outlying areas, and two nighttime channels serving a more restricted area which includes the community of license,[22] in order to add a voice (FM) to outlying areas.

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[21]The new rules prevent an FM licensee from obtaining, in any manner (new station, assignment, transfer), an authorization for a daytime station serving the same area. Additional reasons for restricting authorizations of new daytime stations, whether or not the applicant is an FM licensee, appear in the notice of proposed rulemaking and notice of inquiry in docket No. 18651, note 19, supra.

[22]Present rules require a licensee to serve all of its community of license, day or night.

61. However, with regard to class IV stations in communities under 10,000 population, a special factor convinces us that they should be permitted to obtain FM licenses: Generally there is no other station licensed to the same community to give nighttime service, so that the areas lying outside the nighttime service area of the class IV usually receive no nighttime aural service from local stations. On the other hand, for communities over 10,000 population, generally the outlying areas receive at least one aural service from a local station. We have previously said that because there is no general shortage of aural service we would prevent further concentration of ownership. However, in the case of outlying areas of communities under 10,000 population, there appears to be a shortage, and class IV stations will be permitted to alleviate it by obtaining FM licenses if they desire them.

62. Finally, on the matter of full-time AM stations alleging the need for an FM license in order to compensate for presunrise interference they receive, such applications for FM licenses will be handled on an ad hoc basis. A factor that would be considered in such cases is the relative importance of the alleged loss of service for a few presunrise hours as against the importance of achieving diversity of programing on two channels in the same area for the entire remainder of the day and night.

Miscellaneous matters

63. Television satellite stations are handled on a case-by-case basis under the present duopoly rules because of special problems pertaining to them (see "Multiple Ownership" (docket No. 14711), 29 F.R. 7535, 7539 (1964)). This practice, for the same reasons, is carried over into the new rules.

64. Pursuant to our general plan of permitting power increases for all class IV AM stations, applications for such increases are exempted from the operation of the new rules. However, in view of our expressed intent to discontinue the policy of encouraging class IV power increases as of September 1970 or later in some cases ("Broadcast Station Assignment Standards," 19 F.C.C. 472, 486-7 (1969)), this exemption will be eliminated in like manner.

The nondivestiture provision

65. Some parties urge that although the rules are intended to be prospective and not require divestiture, it is likely that they would produce results contrary to the expressed intent to "grandfather" existing licensees because implicit in the rules is the determination that it is contrary to the public interest for any licensee, prospective or existing, to own more than one station in a market. It is asserted that a flood of competing applications filed at renewal time by new applicants with no broadcast interests in the market, but possessing highly impressive traditional qualifications, would prevail either at the Commission level or on review by the courts, and that this would thwart the intent to grandfather.[23]

66. We believe that our policy statement of January 15, 1970, on comparative hearings at renewal time

[23]Some opponents suggest that, in addition to the foregoing, the WHDH decision (*WHDH, Inc.*, 16 F.C.C. 2d 1, 17 F.C.C. 2d 856 (1969)) would invite filing of competing applications at renewal time. Citizens Committee, a supporter of our proposal, believes that this would not be so because of the uncertain effect of the decision and the reluctance of competitors to file.

adequately covers this question (35 F.R. 822, ____ F.C.C. 2d ____). Moreover, as to the fears which are expressed, our experience since we adopted the fixed overlap duopoly rules, which "grandfathered" existing licensees, has shown that there has been no great shower of competing applications filed against renewal applications for stations the service contours of which overlap those of commonly owned stations.

67. It is appropriate here to mention briefly the arguments which opponents to the rules make with regard to divestiture. Typical is that of Air Trails which says that because of the relative stability of the tenure of ownership and the relatively small number of new applications to be expected in the future as compared with the past, the restructuring of the industry would be slow, and except over a very long period of time, quite minor. (Also see par. 24, supra.) However, opponents are generally quick to state that they oppose divestiture since it would not be feasible or equitable, and would be disruptive and inconstent with the overall broadcast regulatory system. Supporters of the rule are of the view that without divestiture the rules would not be effective. Justice, without using the term, appears to suggest divestiture at renewal time. Citizens Committee and Freddot, Ltd., recommend that divestiture take place in stages to ease the impact.

68. When the notice was issued we believed that it was in the public interest to "grandfather" existing licensees (partly because of the disruptive effect of divestiture), although requiring them to break up combinations when selling their stations. Consideration of the record, however, has given us pause. Being now of the view that the rules we adopt, even though providing for no divestiture, are a reasonable start

toward diversity and are in the public interest, but that divestiture may further serve the public interest, we should like to explore the matter more fully. Accordingly, we are today issuing a further notice of proposed rulemaking looking toward divestiture in order to develop more information on the subject and to give interested parties an opportunity to comment on the matter. For similar reasons, the matter of newspaper ownership, mentioned by various parties, is also dealt with in the further notice.

[324] *Minority cross-interests*

69. ABC, Auburn, and GEBCO assert that the present duopoly portions of the multiple-ownership rules contain no mention of minority-ownership interests. In this connection, they direct our attention to *Radio Athens, Inc. v. FCC*, 13 U.S. App. D.C. 333, 401 F.2d 398 (1968). In that case, Radio Athens, licensee of AM station WATH, filed an application to increase power. A 70-percent stockholder of Radio Athens was, additionally, an officer and director thereof, and also owned less than one-third of the stock of the licensee of a neighboring AM station and was an officer and director of that licensee. Grant of the application would have resulted in the type of overlap of contours proscribed by the duopoly rules.

70. The decision pointed out that the duopoly rules state that a broadcast station license will not be granted to parties directly or indirectly owning, operating, or controlling one or more stations in the same broadcast service if the grant of the license will result in any overlap of specified service contours. The court held that the rules by themselves did not advise a person that ownership of less than one-third of the stock of a

close corporation of which he was an officer and director constituted, as a matter of law, such control as to make the application patently violative of the Commission's rules and subject to being not accepted for filing by the Commission.

71. The court stated that various constructions which the Commission had in the past made of the duopoly rule to make it operative in cases of cross-interest, whether or not the interest is tantamount to ownership, operation, or control, did not operate to give an applicant fair notice that its application was patently not in accordance with the rules and therefore subject to being rejected. It said that in circumstances where such a drastic step as dismissal of an application without any consideration is involved more clarity of notice to an applicant was needed and suggested that this should be given by the adoption of rules. However, it also said that agencies may rightly expect attention to be accorded to their interpretative rulings and expect attention to be accorded to their interpretative rulings and indicated that in cases not involving outright dismissal of an application such an expectation would be justified.

72. ABC, Auburn, and GEBCO state that since the notice did not mention minority cross-interests, they assume that the present proceeding is not directed at broadening the duopoly rules to embrace such interests, and that if the Commission decides to take such a step they will be given an opportunity to comment pursuant to provisions of the Administrative Procedure Act. We agree that the notice did not refer to minority cross-interests, and the rules we adopt today contain no

new language thereon.[24] Inasmuch as the new rules are an extension of the present duopoly rules, we are announcing that the rulings that we have made in the past on minority cross-interests in duopoly cases will be carried over and applied to cases involving such interest under [325] the new rules.[25] However, of course, situations under the new rules that are like that which arose in *Radio Athens*, in which an application was dismissed as not acceptable for filing, will be treated consistently with the holding of that case.

73. The subject of minority cross-interests, involving, for example, less than complete cross-ownership, interlocking directorates, partial ownership in one station and employment by another, and other matters, is in need of reexamination and we intend to give it consideration which may lead to actions looking toward the issuance of interpretative or other regulations.

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[24] By a report and order in docket No. 15627 ("Multiple Ownership of AM, FM, and TV Stations," 13 F.C.C. 2d 357 (1968)) amendments to the multiple-ownership rules were adopted. They became effective about 3 weeks after the decision in *Radio Athens*. Although not going into the question of minority cross-ownership interests in detail, new note 2 of the rules as amended therein states that partial as well as total ownership interests in corporate broadcast licensees are considered in administering the duopoly rules.

[25] See conditions applied against cross-interests in two overlapping television stations, WECT-TV, Wilmington, N.C., public notice of Jan. 13, 1966, mimeograph No. 78695, Roy H. Park, who held control of one of two overlapping stations, WNCT-TV, Greenville, N.C., and also a minority stock interest in WECT-TV, Wilmington, N.C. (the second overlapping station), was precluded from holding an office in or participating in the management of WECT-TV.

THE INTERIM POLICY

74. The notice, as clarified by the memorandum opinion and order, provided that all applications within the scope of the proposed rules tendered for filing on or before April 3, 1968 (the date the notice was published in the *Federal Register*) and subsequently accepted for filing would be processed according to existing rules and precedents. However, as an interim policy, applications falling within the scope of the proposed rules that were tendered for filing after that date would be accepted for filing if they otherwise complied with Commission rules or other requirements, but would not be acted on until the Commission had determined the action to be taken on the proposed rules.

75. If applications were mutually exclusive and some or all of them fell under the provisions of the interim policy, the applications were not to be designated for hearing, but were to be held in a pending file without further action until decisions were reached in this proceeding. However, to avoid the creation of a backlog, this aspect of the policy was subsequently modified (*Seaborn Rudolph Hubbard et al.*, 15 F.C.C. 2d 690 (1968), 16 F.C.C. 2d 312 (1969)) to provide that such mutually exclusive applications would be designated for hearing. If in such a hearing an application not in conflict with the proposed rules were preferred, a grant would be made in the usual manner. If the preferred application were one falling within the scope of the proposed rules, then it and all other applications remaining in the proceeding would be held in hearing until resolution of the rulemaking proceeding, with appropriate action being taken in the light of the disposition of the rulemaking proceeding.

76. On relatively few occasions the Commission, in dealing with applications that fell within the scope of the proposed rules and that were not mutually exclusive with other applications, has for good cause waived the interim policy and made an unconditional grant; or a grant subject to the condition that the purchaser of more than one full-time station in the same market dispose of the excess stations as soon as possible, or within a specified period of time: or a grant subject to the outcome of this proceeding.

[326] 77. Our unconditional grants and those with the condition of divestiture will, of course, stand. With regard to grants subject to the outcome of this proceeding which involve assignment or transfer of AM-FM combinations that are in the same market under the new rules, we shall, if the material on file contains sufficient information to show that the stations cannot be separately sold and operated, and if they would not be in the same market as a commonly owned TV station, make the grant final. If more information is needed for a decision on such cases it will be requested of the applicants. In cases where the proper showing is not made, the AM-FM facilities must be separated. Grants involving TV and aural facilities in the same market will also be required to be separated. Applications for waiver will be considered. Grants involving TV satellite stations will be reviewed on an ad hoc basis.

78. The new rules will be effective as to pending applications tendered for filing after April 3, 1968, whether or not in hearing status. Pending applications may be amended to bring them into compliance with the new rules. If possible, such amendment should be made prior to the effective date of the rules.

Applications which are in hearing status may be amended, subject to the usual rules governing removal from hearing status. All applications (in hearing or otherwise) which are not amended to achieve compliance will be dismissed when the new rules become effective unless good cause is shown for not having so amended prior to the effective date.

ORDER

79. In view of the foregoing, *It is ordered*, That part 73 of the Commission's rules and regulations *Is amended*, effective May 15, 1970, as set forth in the attached appendix B.

80. Authority for the adoption of the rules herein is contained in sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

Federal Communications Commission,
Ben F. Waple, *Secretary.*

APPENDIX A

PARTIES FILING COMMENTS
(*Indicates reply comments also filed)

Air Trails, Inc., et al.
- Air Trails, Inc.
- Bulletin Co.
- Great Trails Broadcasting Corp.
- KPAT, Inc.
- Radio Voice of Springfield, Inc.

- Reams Broadcasting Corp.
- RKO General, Inc.
- Royal Street Corp.
- Roywood Corp.
- Time-Life Broadcast, Inc.
- WEZE, Inc.
- WKY Television System, Inc.
- WRIT, Inc.

Alexandria Broadcasting Corp. (Alexandria)
[327] The All-Channel Television Society (ACTS)
American Broadcasting Cos., Inc.* (ABC)
Armstrong Broadcasting Corp. (Armstrong)
Association On Broadcasting Standards, Inc. (ABS)
Atlantic States Industries, Inc.* (Atlantic)
Auburn Broadcasting Corp., et al. (Auburn)
- Auburn Broadcasting Corp.
- Babcock Cos., Inc.
- Channel 10, Inc.
- Group One Broadcasting Co.
- Group One Broadcasting Co. of Texas
- Guaranty Broadcasting Corp.
- Island Teleradio Service, Inc.
- KAKC of Tulsa, Inc.
- KFAB Broadcasting Co.
- KMAP, Inc.
- May Broadcasting Co.
- Plains Television Corp.
- Sagre De Cristo Broadcasting Corp.
- Summit Radio Corp.
- WKNE Corp.
- WKRG-TV, Inc.
- Spanish International Broadcasting Co.

Augusta Broadcasting Co. (Augusta)
Basic Communications, Inc., et al. (Basic Communications)
- Basic Communications, Inc.

Binghamton Press Co., Inc.
Central California Communications Corp.
Daily Telegraph Printing Co.
Daytona Broadcasting, Inc.
Evans Communications System, Inc.
Gannett Florida Corp.
Golden West Broadcasters
Golden West Broadcasters, Inc.
Guy Gannett Broadcasting Services
James Broadcasting Co.
Lake Shore Broadcasting Co., Inc.
Mount Hood Radio & Television Broadcasting Corp.
Multimedia, Inc.
New Hampshire-Vermont Broadcasting Corp.
Newhouse Broadcasting Corp.
Northwestern Publishing Corp.
Palmer Broadcasting Co.
Plough Broadcasting Co., Inc.
Providence Journal Co.
Radio Medford, Inc.
Southern Minnesota Broadcasting Co.
The WHYN Stations Corp.
Truth Publishing Co., Inc.
Truth Radio Corp.
United Television, Inc.
Vermont Radio, Inc.
WCSC, Inc.
WERC, Inc.
WHEC, Inc.
Wichita Great Empire Broadcasting, Inc.
WKJG, Inc.
WOC Broadcasting
WREX-TV, Inc.
WTRF-TV, Inc.
WUNI, Inc.

H. Mims Boswell (Boswell)
Buckley Broadcasting Corp., of California (Buckley)
[328] Capital Cities Broadcasting Corp.* (Capital Cities)
Carter Publications, Inc.* (Carter)
Carthage Broadcasting Co. (Carthage)
Marcus Cohn, Law Offices of
Columbia Broadcasting System, Inc.* (CBS)
Community Broadcasters Association, Inc. (CBA)
Community Broadcasting Service and Community Telecasting Service (Community Service)
Cornbelt Broadcasting Corp.* (Cornbelt)
Davis Broadcasting Co.* (Davis)
Doubleday Broadcasting, Inc. (Doubleday)
Duhamel Broadcasting Enterprises (Duhamel)
Eastern Iowa Broadcasting Inc., et al. (Eastern Iowa)
Eastern Iowa Broadcasting, inc.
Southern Broadcasting Corp.
Spartan Radiocasting Co.
Vermont New York Television, Inc.
W.A.V.E., Inc.
WFIE, Inc.
WRFV, Inc.
WMT-TV, Inc.
Empire Broadcasting Corp. (Empire)
Fayette Broadcasting Corp. (Fayette)
Flynn Enterprises, Inc. (Flynn)
Freddot Ltd.*
General Electric Broadcasting Co., Inc.* (GEBCO)
Golden Empire Broadcasting Co. (Golden Empire)
Gross Telecasting, Inc. (Gross)
Philip Y. Hahn, Jr. (Hahn)
Hall Communications, Inc. (Hall)
Heart O'Wisconsin Broadcasting, Inc., et al. (Heart O'Wisconsin)

Heart O'Wisconsin Broadcasters, Inc.
Metropolitan Radio Corp.
WSJM, Inc.
Beaver Dam Broadcasting Co.
Value Radio Corp.
Town and Country Radio, Inc.
The Jet Broadcasting Co., Inc. and WHOT, Inc. (Jet)
Department of Justice (Justice)
KCIL, Inc. et al. (KCIL)
KCIL, Inc.
Dixie Radio, Inc.
John W. Spottswood
Woofum, Inc.
Retherford Broadcasting, Inc.
Roger Williams Broadcasting, Inc.
KFXM Broadcasting Co. (KFXM)
KMMO, Inc. (KMMO)
KMSO-TV, Inc. (KMSO)
KPRO, Inc. (KPRO)
KTAR Broadcasting Co. and The Tribune Co. (KTAR)
Lafayette Broadcasting, Inc. (Lafayette)
Lotus Theatre Corp., Lotus Broadcasting Corp., and Lotus Radio Corp. (Lotus
Lunde Corp.* (Lunde)
Maine Radio and Television Co.* (Maine)
Maryland/District of Columbia/Delaware Broadcasters Association, Inc. (Md./D.C.)
McClatchy Newspapers* (McClatchy)
Meredith Broadcasting Co. (Meredith)
Mid-Illinois Broadcasting Co., et al. (Mid-Illinois)
Mid-Illinois Broadcasting Co.
Talley Broadcasting Co.
North Central Iowa Broadcasting Co.
Midnight Sun Broadcasters, Inc. (Midnight Sun)

[329] Mount Wilson FM Broadcasters, Inc.* (Mount Wilson)
E. Harold Munn, Jr. (Munn)
Mutual Broadcasting System, Inc. (MBS)
National Association of Broadcasters* (NAB)
National Broadcasting Co., Inc.* (NBC)
Nebraska Broadcasters Association (Nebraska Assoc.)
Northern Television, Inc. (Northern Television)
North Idaho Broadcasting Co. (North Idaho)
The Ohio Association of Broadcasters (Ohio Assoc.)
The Oklahoma Broadcasters Association (Oklahoma Assoc.)
Pacific & Southern Co., Inc. (Pacific & Southern)
Pappas Electronics, Inc. (Pappas)
Radio Station WPAY, Inc. (WPAY)
Radio Station WPFB (WPFB)
R. B. G. Productions, Inc. (R.B.G.)
Salt Lake City Broadcasting Co., Inc. (Salt Lake)
Screen Gems Broadcasting of Utah Inc. et al. (Screen Gems of Utah)
Screen Gems Broadcasters of Utah, Inc.
Cleveland Broadcasting, Inc.
Hubbard Broadcasting, Inc.
Ring Radio Co.
Beef Empire Broadcasting Co.
WJAG, Inc.
Dublin Broadcasting Co.
Sitka Broacasting Co., Inc.* (Sitka)
Southern Broadcasting Co. (Southern)
Southwest Kansas Television Co., Inc. (Southwest Kansas)
Springfield Television Broadcasting Corp. (Springfield)
Stauffer Publications, Inc. (Stauffer)
Storer Broadcasting Co. (Storer)

Television Chicago, a joint venture (Television Chicago)
Triangle Broadcasting Corp. (Triangle Broadcasting)
Triangle Publications, Inc. (Triangle Publications)
Triple-R, Inc. (Triple-R)
VIP Broadcasting Corp. (VIP)
WACO Broadcasting Corp. (WACO)
Westinghouse Broadcasting Co., Inc. (Westinghouse)
WFTZ Broadcasting Co. (WFTZ)
WHIR, Inc. (WHIR)
WHP, Inc. (WHP)
Woodward Broadcasting, Inc. (Woodward)

PARTIES FILING REPLY COMMENTS ONLY

Air Trails, Inc. et al. (Air Trails)[1]
  Air Trails, Inc.
  Builetin Co.
  Eastern States Broadcasting Corp.
  The Evening News Association
  KPAT, Inc.
  Lee Enterprises, Inc.
  Royal Street Corp.
  Sis Radio, Inc.
  Time-Life Broadcast, Inc.
  WDSU-TV, Inc.
  WKY Television System, Inc.
  WRIT, Inc.
American Newspaper Publishers Association (ANPA)
Badger Broadcasting Co., et al. (Badger)
  Badger Broadcasting Co., Inc.

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[1] Note that to some extent the parties jointly filing reply comments under "Air Trails" are the same as and to some extent different from those who filed comments under "Air Trails."

Binghamton Press Co., Inc.
Bloomington Broadcasting Corp.
Carolina Broadcasting Co.
[330] Cox Broadcasting Corp.
Daily Telegraph Printing Co.
Gannett Florida Corp.
Guy Gannett Broadcasting Services
KSLA-TV, Inc.
Lewistown Broadcasting Co.
Miami Valley Broadcasting Corp.
Mount Hood Radio & Television Broadcasting Corp.
Multimedia, Inc.
Newark Broadcasting Corp.
Newhouse Broadcasting Corp.
Northwestern Publishing Co.
Providence Journal Co.
Quincy Broadcasting Co.
Quincy Newspapers, Inc.
RadiOhio, Inc.
Rock Island Broadcasting Co.
The Palladium Publishing Co.
The WHYN Stations Corp.
Tribune Publishing Co.
Truth Publishing Co., Inc.
WBNS-TV, Inc.
WCTW, Inc.
WHDL, Inc.
WHEC, Inc.
WHC-TV Corp.
WJAC, Inc.
WKJG, Inc.
Jose Bechara, Jr. (Bechara)

Bloomington Broadcasting Corp. et al. (Bloomington)[2]
Bloomington Broadcasting Corp.
Carolina Broadcasting Co.
Cosmos Broadcasting Corp.
Cox Broadcasting Corp.
Daily Telegraph Printing Co.
Fetzer Broadcasting Co.
Guy Gannett Broadcasting Services
Maui Publishing Co., Ltd.
McClatchy Newspapers
Miami Valley Broadcasting Corp.
Mount Hood Radio & Television Broadcasting Corp.
Multimedia, Inc.
Newhouse Broadcasting Corp.
Palladium Publishing Co.
Palmer Broadcasting Co.
Plough Broadcasting Co., Inc.
Providence Journal Co.
Quincy Broadcasting Co.
Radio Medford, Inc.
Rock Island Broadcasting Co.
Southern Minnesota Broadcasting Co.
The Dodge City Broadcasting Co., Inc.
The WHYN Stations Corp.
Tribune Publishing Co.
Truth Publishing Co., Inc.
Truth Radio Corp.
WBNS TV, Inc.
WCSC, Inc.
WHC-TV Corp.
WJAC, Inc.

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[2]There is substantial overlap of parties filing these reply comments and those who filed jointly under Badger Broadcasting Co., et al. supra.

WKJG, Inc.
WOC Broadcasting Co.
WROK, Inc.
[331] Paul F. Braden (Braden)
Buford Broadcasting, Inc. (Buford)
Cape Fear Broadcasting Co., Inc. (Cape Fear)
Capital City Television, Inc. (Capital City TV)
Chicago Federation of Labor and Industrial Union Council (Chicago Federation)
Federal Broadcasting System, Inc. (Federal)
Frank Baranowski (Baranowski)
Hilliard Co. (Hilliard)
Houston Post Co. (Houston Post)
Illinois Broadcasting Co. (Illinois Broadcasting)
The Mile High Broadcasting Co., Inc. (Mile High)
KTRM, Inc. (KTRM)
KVOC, Inc. (KVOC)
Leon T. Scblic and Lloyd G. Reedstron, joint venture (KYNT)
Lebanon Broadcasting Co. (Lebanon)
Lincoln Broadcasting Co., Inc. (Lincoln)
National Citizens Committee for Broadcasting (Citizens Committee)
Oil Shale Broadcasting Co. (Oil Shale)
Peoples Broadcasting Co. (People's)
Post-Newsweek Stations, Capital Area, Inc. et al. (Post-Newsweek)
Post-Newsweek Stations, Capital Area, Inc.
Post-Newsweek Stations, Florida, Inc.
Southern Broadcasting Corp.
Spartan Radiocasting Co.
Vermont New York Television, Inc.
Vermont New York Broadcasters, Inc.
W.A.V.E., Inc.
WIFE, Inc.

WFRV, Inc.
WMT, Inc.
Radio-TV Enterprises, Inc. (Radio-TV)
Rome Sentinel Co. (Rome Sentinel)
Savannah Broadcasting Stations (Savannah)
Shenandoah Life Stations (Shenandoah Life)
Springfield Television, Inc. (Springfield Television)
Tillman Broadcasting Co. (Tillman)
Times Herald Printing Co. (Times Herald)
Tropics, Inc. (Tropics)
WBEN, Inc. et al. (WBEN)
WBEN, Inc.
Hubbard Broadcasting, Inc.
Griffin-Leake TV, Inc.
Screen Gems Broadcasting of Louisiana, Inc.
Screen Gems Broadcasting of Utah, Inc.[3]
WAPA-TV Broadcasting Corp.
Pikes Peak Broadcasting Co.
WJAG, Inc.
Faulkner Radio Inc.
Owensboro Broadcasting Co.
Radio Columbus, Inc.
Tri-State Broadcasting Co., Inc.
Vidalia Broadcasting Co.
KWTX Broadcasting Co.
Dublin Broadcasting Co.
The Corbin Times Tribune, Inc.
Hartville Broadcasting Co., Inc.
Rustcroft Broadcasting of New York, Inc.
News Journal Corp.
WGN Continental Broadcasting Co. (WGN)

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[3] Filed comments jointly with others, but filed separate reply comments.

[332] APPENDIX B

1. Section 73.35 of the Commission's rules and regulations is amended by revising paragraph (*a*) and note 7, and by adding new note 8 to read as follows:

§ 73.35 *Multiple ownership.*

* * *

(*a*) Such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1-mv./m. groundwave contours of the existing and proposed stations, computed in accordance with section 73.183 or section 73.186; or one or more FM broadcast stations and the grant of such license will result in the predicted or measured 2-mv./m groundwave contour of the proposed station, computed in accordance with section 73.183 or section 73.186, encompassing the entire community of license of one of the FM broadcasting stations, or will result in the predicted 1-mv./m. contour(s) of the FM broadcast station(s), computed in accordance with section 73.313, encompassing the entire community of license of the proposed station; or one or more television broadcast stations and the grant of such license will result in the predicted or measured 2-mv./m. groundwave contour of the proposed station, computed in accordance with section 73.183 or section 73.186, encompassing the entire community of license of one of the television broadcast station(s), computed in accordance with section 73.684, encompassing the entire community of license of the proposed station; or

* * *

Note 7. (Paragraph (*a*) of this section will not be applied so as to require divestiture, by any license, of existing facilities. Said paragraph will not apply to applications for increase power for class IV stations: to applications for assignment of license or transfer of control filed in accordance with sections 1.540(b) or 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated, or controlled standard broadcast stations and if no new encompassment of communities proscribed in paragraph (*a*) of this section as to commonly owned, operated, or controlled standard broadcast stations and FM or television broadcast stations would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of standard broadcast stations with each other no greater than that already existing. (The resulting areas of overlap of contours of standard broadcast stations with each other in such major change cases may consist partly or entirely or new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, and necessity.) Commonly owned, operated, or controlled broadcast stations with overlapping contours or with community-encompassing contours prohibited by paragraph (*a*) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above

in this note; and except in cases where the stations are standard and FM broadcast stations, if the applications contain a satisfactory showing that for economic or technical reasons the stations cannot be separately sold and operated, and if no new or increased overlap between commonly owned, operated, or controlled standard broadcast stations would be created and no proscribed encompassment of communities by standard, FM or television broadcast stations would result (other than that of the standard and FM stations in question).

Note 8. Paragraph (*a*) of this section will not be applied to cases involving television stations which are primarily satellite operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programing is primarily a satellite operation will be determined on the facts of the particular case. An [333] authorized and operating satellite television station the grade A contour of which completely encompasses the community of license of a commonly owned, operated, or controlled standard broadcast station, or the community of license of which is completely encompassed by the 2-mv./m. contour of such a standard broadcast station may subsequently become a nonsatellite station with local studios and locally originated programing. However, such commonly owned, operated, or controlled standard and nonsatellite television stations may not be transferred or assigned to a single person, group, or entity.

2. Section 73.240 of the Commission's rules and regulations is amended by revising subparagraph (1) of paragraph (a), by revising note 7, and by adding new note 8 to read as follows:

§ 73.240 *Multiple ownership.*

(*a*) * * *

(1) Such party directly or indirectly owns, operates, or controls: one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1-mv./M. contours of the existing and proposed stations, computed in accordance with section 73.313; or one or more full-time standard broadcast stations (except class IV stations in communities of less than 10,000 population) and the grant of such license will result in the predicted 1-mv./m. contour of the proposed station, computed in accordance with section 73.313, encompassing the entire community of license of one of the full-time standard broadcast stations, or will result in the predicted or measured 2-mv./m.-groundwave contour(s) of the standard broadcast station(s), computed in accordance with section 73.183 or 73.186, encompassing the entire community of license of the proposed station; or one or more television broadcast stations and the grant of such license will result in the predicted 1-mv./m. contour of the proposed station, computed in accordance with section 73.313, encompassing the entire community of license of one of the television broadcast station(s), computed in accordance with section 73.684, encompassing the entire community of license of the proposed station; or

* * *

Note 7. Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any

licensee, of existing facilities. Said paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with section 1.540(b) or 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated, or controlled FM broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled FM broadcast stations and standard or television broadcast stations would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of FM broadcast stations with each other no greater than that already existing. (The resulting areas of overlap of contours of FM broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Commonly owned, operated, or controlled broadcast stations with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note; and except in cases where the stations are standard and FM broadcast stations, if the applications contain a satisfactory showing that for economic or technical reasons the stations cannot be separately sold and

operated, and if no new or increased overlap between commonly owned, operated, or controlled FM broadcast stations would be created and no proscribed encompassment of communities by FM, standard, or television broadcast stations would result (other than that of the standard and FM stations in question).

[334] Note 8. Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily satellite operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programing is primarily a satellite operation will be determined on the facts of the particular case. An authorized and operating satellite television station the grade A contour of which completely encompasses the community of license of a commonly owned, operated, or controlled FM broadcast station, or the community of license of which is completely encompassed by the 1-mv./m. contour of such an FM broadcast station may subsequently become a nonsatellite station with local studios and locally originated programing. However, such commonly owned, operated, or controlled FM and nonsatellite television stations may not be tranferred or assigned to a single person, group, or entity.

3. Section 73.636 of the Commission's rules and regulations is amended by revising subparagraph (1) of paragraph (a), by revising note 7, and by revising note 8 to read as follows:

§ 73.636 *Multiple ownership.*

(*a*) * * *

(1) Such party directly or indirectly owns, operates, or controls: one or more television broadcast stations and the grant of such license will result in any overlap of the grade B contours of the existing and proposed stations, computed in accordance with section 73.684; or one or more full-time standard broadcast stations and the grant of such license will result in the grade A contour of the proposed station, computed in accordance with section 73.684, encompassing the entire community of license of one of the full-time standard broadcast stations, or will result in the predicted or measured 2-mv./m.-groundwave contour(s) of the standard broadcast station(s), computed in accordance with section 73.183 or 73.186, encompassing the entire community of license of the proposed station; or one or more FM broadcast stations and the grant of such license will result in the grade A contour of the proposed station, computed in accordance with section 73.684, encompassing the entire community of license of one of the FM broadcast stations, or will result in the predicted 1-mv./m. contour of the FM broadcast station(s), computed in accordance with section 73.313, encompassing the entire community of license of the proposed station; or

* * *

Note 7. Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, or existing facilities. Said paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with section 1.540(b) or 1.541(b) of this chapter, or to

applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated, or controlled television broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled television broadcast stations and standard or FM broadcast stations would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes that will result in overlap of contours of television broadcast stations with each other no greater than that already existing. (The resulting areas of overlap of contours of television broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, and necessity.) Said paragraph will not apply to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in grade B overlap with another television broadcast station that was commonly owned, operated, or controlled as of September 30, 1964; or to any application concerning a UHF television broadcast station which would result in the grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled standard or FM broadcast station or which would result in the entire [335] community of license of such UHF station being encompassed by the 2-mv./m. or

1-mv/m. contours of such standard or FM broadcast stations, respectively. Such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided in this note.

Note 8. Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily satellite operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programing is primarily a satellite operation will be determined on the facts of the particular case. An authorized and operating satellite television station the grade B contour of which overlaps that of a commonly owned, operated, or controlled nonsatellite parent television station may subsequently become a nonsatellite station with local studios and locally originated programing. However, such commonly owned, operated, or controlled nonsatellite stations with grade B overlap may not be transferred or assigned to a single person, group, or entity.

CONCURRING AND DISSENTING STATEMENT OF CHAIRMAN DEAN BURCH

Since I both concur and dissent, a brief statement of my views is called for. The basic issue in this proceeding—diversifying sources of programing—is a most important one. I would not, however, give priority to breakup of aural-visual services.

As an initial matter, I would note again my strongly held view that providing the regulatory climate which will assure implementation of program origination by CATV systems (including channels for common carrier usage), over-the-air pay-TV, use of satellites for new broadcast and cable networks, and a really properly financed educational service, should be assigned top priority, because that is by far the best and most effective way of obtaining maximum diversity of programing. However, putting that aside and turning to this proceeding, I submit that it is flawed.

The Commission has been considering solely the question of future acquisitions, by new application or purchase, of TV-AM-FM combinations in the same market. Where there are only a few aural services, this may be a significant issue (although often in areas of sparse population, only the multiple owner will come forward to provide UHF or FM service). But in the great majority of cases, it is not a pressing issue. The reason is obvious: In the Washington metropolitan area there are 37 aural services; in New York, 59; in Chicago, 61 and so on. There is a plethora of aural services in all significant markets. Thus, while separating TV from AM or FM might make a contribution in a few cases, it is clearly far from the heart of the problem. The plain fact is that the Commission has

labored for over 2 years, received reams of comments, heard extensive argument, only to bring forth a rule which applies to areas of ownership least needing attention, if at all.

Clearly, the media cross-ownership matter warranting the most attention is that of VHF-TV and the daily newspaper. There are only a few daily newspapers in each large city and their numbers are [336] declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then is the guts of the matter. As far as I am concerned, if there is any threat of undue concentration, and I have of course reached no final conclusion on this score, it does not lie in cross ownership of AM-FM-TV.

As I said, I obviously have not made up my mind on local cross-ownership of VHF-TV and the daily newspaper. Let's face up to the fact that if we are going to inquire into concentration, we should have started at the most obvious point.

I have heard my colleague, Commissioner Robert E. Lee, set forth views concerning the stability of the newspaper owner—that such an owner does not "traffick" and does a better job of serving as an outlet for local expression. These factors and many others have to be explored in the proceeding, and, as I stressed, I remain openminded on the issue. My point here is simply that that is the issue.

The majority do not, I think, dispute the greater importance of the issue. As I understand it, their position comes down to this: "Perhaps we did omit the

most important aspect from the rulemaking; however, we must act now as we can, and then consider other aspects in the further proceeding" (again, I note, with the issue of the aural-TV cross-ownership having equal footing with the much more important issue of TV-newspaper).

I recognize that this position is not without some substance. It sounds good in theory, but pragmatically it fails. The action is a prime example of bureaucratic tinkering to no effect. The capacity of our agency to take action on complex, difficult, much controverted matters should not be exhausted by continual actions which chop away at the system little by little rather than going straight to the heart of the matter—to find if there is a problem and, if so, to cure it.

I join in that portion of the action which looks belatedly to consideration of the heart of this problem, but I would dissent to going forward with any across-the-board rule prohibiting the acquisition, either by new application or assignment of aural and visual services in the same market, or any proposal looking toward divestiture of aural-visual services.

DISSENTING STATEMENT OF COMMISSIONER ROBERT WELLS

The Commission has today taken drastic action and has proposed more. It has done so with little justification, and with insufficient investigation and understanding of the consequences of its action. Some of the consequences are speculative, others will depend upon the flexibility of the Commission in granting waivers where necessary; however, I have no doubt but

that the rule adopted today and the one proposed will disserve the public interest.

I have read carefully the portion of the report and order entitled "Need for the Rules," and the proposed rulemaking. I cannot find sufficient reason in either document for the adoption and proposal of rules which change the structure of the industry. The Commission has [337] not only permitted the structure until today, but has actively encouraged it in many cases. Every multiple owner obtained his licenses from the Commission—often after comparative hearings. Each applicant's other broadcast interests and the structure of the market that he proposed to serve were known at the time he was granted his license.

The majority does not cite abuses of power of multiple owners, or contend that their presence has restricted entry into broadcasting or has adversely affected competition. It states only that the market will be more competitive and that potential competitive benefits need not be predictable. The Commission reverses long-standing policy by positing as the goal of its regulation the assurance that a diversity of "voices" exists. It then asks "what is ample diversity" and with very little analysis, concludes that it is to be maximum diversity. I can find no other justifications for the action taken today.

One would expect such drastic changes in policy to be buttressed by a compelling showing of public benefit, but the Commission shows no abuse and only speculates as to future benefit. I realize that we have considerable latitude in determining public interest and regulating accordingly; but today we chart a new course in broadcasting with no showing of necessity for change and little appreciation of, or attention to, possible

consequences of our action on broadcast service to the public.

Many comments filed by broadcasters stated that multiple ownership permitted more quality news and public affairs programing than would be economically feasible on a single outlet because of the ability to attract better talent which can be used on each facility. The broadcasters predicted, with apparent justification, that the quality of news and public affairs programing would suffer if the facilities were separately owned. The Commission responds that present multiple owners would have stations in other markets which would permit the same financial strength and, therefore, the same quality programing. This is unresponsive. It is the fact that each facility benefits from the larger news and public affairs staff that permits superior quality. A 30-man news staff in a Chicago television station would contribute little to a commonly owned FM station in Portland.

The majority states that there is no evidence that multiple owners provide better service than single outlets. The question of whether present service would deteriorate if the facilities were operated separately, particularly if one or more should be a marginal operation, is ignored. If an FM station now benefiting from an active local news staff of a jointly owned television station joins the ranks of those whose news consists of reading from a wire service and local press releases, we have hardly made a meaningful contribution. I am certain that the Commission does not expect this result, but it is unrealistic to think that it may not occur. The majority states that 60 different licensees are more desirable than 50. But if the result of having 60 licensees is a deterioration in the service of 20 outlets, we have hardly accomplished our goal.

Potential abuse may be greater with multiple owners simply because they have additional outlets, but we have an ample arsenal of regulatory powers to deal with abuses as they arise. We hesitate to use these [338] powers to fashion specific remedies for specific abuses, however, choosing instead to adopt a blanket rule. I had assumed that we have been given considerable discretion in regulating the industry so that we could meet such abuses on a case-by-case basis.

Many other ramifications of today's rules cannot be predicted. I believe, however, that they will be substantial, and may affect the quality of service in many ways. The economic impact of the rules and the proposed rules is difficult to assess. I do not know what will result. Clearly the majority does not. Surely upgrading the facilities that may have to be sold will cease. The psychological impact on the industry will doubtless be substantial because these far-reaching rules have been adopted and proposed with little apparent justification, and because of the dramatic reversal of policy after years of encouragement to expand into new services. Broadcasters may be understandably chary of the Commission's encouragement to enter UHF knowing that their ownership may be secure only until they are successful. The impact on broadcast staffs, many of whom participate to some extent in station ownership either directly or through employee trusts, is another imponderable. Surely the proposed divestiture rules will create some uncertainty, and may adversely affect the ability of stations to attract and keep personnel until the issue has been settled.

I resist the temptation to prolong this dissent with repetition of the many arguments and statistics presented in the comments. I trust that the Commission

will consider carefully its authority to adopt the proposed rules relating to divestiture, particularly with respect to newspapers, as well as the consequences of doing so.

[22 F.C.C.2d 339] F.C.C. 70-311

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
Amendment of Sections 73.35, 73.240, and	)	
73.636 of the Commission's Rules	)	Docket
Relating to Multiple Ownership	)	No.
of Standard, FM and Television	)	18110
Broadcast Stations	)	

Further Notice of Proposed Rulemaking

(Adopted March 25, 1970)

By the Commission: Chairman Burch concurring in part and dissenting in part and issuing a statement: Commissioner Robert E. Lee concurring and issuing a statement: Commissioner Wells dissenting and issuing statement.

Notice is hereby given of further proposed rulemaking in the above-captioned matter.

BACKGROUND INFORMATION

2. Until now, the so-called duopoly rules, which form a part of the Commission's multiple-ownership rules, have prohibited ownership, operation, or control of stations in the same broadcast service which have overlapping service contours (47 C.F.R. secs. 73.35(a), 73.240(a)(1), 73.636(a)(1) (1969)). The twofold purpose of these rules is to promote competition and to

increase the diversification of program and service viewpoints.

3. In a first report and order adopted today in the instant proceeding (____ F.R. ____), the duopoly rules were amended by extending the proscription to cut across the three broadcast services. Under the new rules, common ownership, operation, or control of any broadcast station (AM, FM, or TV), and any other broadcast station (AM, FM, or TV), in the same market is prohibited. The rules apply only to those who seek to obtain new authorizations. They do not require divestiture, by any licensee, of existing facilities.[1]

4. As was mentioned in the first report and order (par. 68), when we commenced this proceeding we believed it was in the public interest not to require existing licensees to divest themselves of broadcast properties to achieve compliance with the rules, and our proposal reflected this view. The position was based partly on the disruptive effects that divestiture might have. Moreover, our proposal pertained only to [340] broadcast facilities and did not cover common ownership of newspapers and broadcast facilities serving the same area.

5. The comments of the Department of Justice, noting that our proposed rules did little to lessen existing concentration of communications media in many major cities, suggested that consideration be given

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[1]Some exceptions to the rules include the following: (1) The licensee of a class IV AM station in a small community may obtain a license for an FM station serving the same area; (2) the licensee of a daytime-only AM station may obtain a license for an FM station; and (3) the licensee of any AM station and a commonly owned FM station serving the same area may, upon a proper showing, sell both stations to a single party.

to extending the policy of the proposed amendments, in some form, to license renewal proceedings and to newspaper-broadcasting combinations.[2] It was assumed by parties to the proceeding, as well as by the Commission, that the suggestion meant that action should be taken to require divestiture of some degree and that ownership of newspapers should enter into such considerations. Parties, of course, had the opportunity to file reply comments directed at the suggestion, and many did so.

6. It may be that with the proceding in that posture, we could have adopted rules requiring divestiture and embracing newspaper ownership in the first report and order (*Owensboro on the Air, Inc. v. U.S.*, 104 App. D.C. 391, 262 F.2d 702 (1958), cert. den. 360 U.S. 911 (1959)). However, in the light of the far-reaching ramifications that such rules would have, and the lack of specifiying of the Department's suggestion, we considered it the better course legally, as well as in terms of fundamental fairness, not to do so even though we might have thought such rules to be in the public interest. Moreover, we believed that we had insufficient information on the subject.

7. Accordingly, the rules adopted today in the first report and order do not require divestiture and do not pertain to newspaper ownership. We believe them to be a reasonable start in the direction of promoting diversification of viewpoints expressed over the air in individual localities. However, comments filed in this proceeding to date have led us to the view that it might

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[2]Comments of other parties also suggested that consideration be given to common ownership of newspapers and broadcasting facilities serving the same community.

be in the public interest to fashion rules embracing divestiture and newspaper ownership, and we seek through the vehicle of this further notice to make a careful examination of the matter.

COMMENTS OF PARTIES

Divestiture

8. As we stated in the first report and order (par. 67), opponents of the proposed rules argued that since no divestiture would be required the desired restructuring of the broadcast industry would be slow, and, except over a very long period of time, quite minor. It was urged that without divestiture, the rules would only prevent further combinations and would strengthen the already competitively superior position of existing or new independent stations. Moreover, combination owners would be reluctant to sell, because of their good positions, and this would freeze the present structure of the broadcast industry, it was averred.

9. However, opponents making the foregoing arguments generally expressed opposition to divestiture on the grounds that it would not be equitable and would be unduly disruptive. Several supporters of our proposal, while agreeing that without divestiture the rules would [341] not be effective, were of the view that there should be divestiture, but that it should take place in stages to cushion the economic impact.

10. Many opponents directed their reply comments at the suggestion of the Department of Justice that the policy of the proposed rules be extended to apply to license renewals. Some viewed this suggestion as really amounting to a proposal of forfeiture of existing

stations by multiple owners, and cited cases in support of the statement that absent the strongest showing of illegal action, even an adjudication of violation of the antitrust laws does not result in the imposition of forfeitures. They pointed out that forfeiture would be especially unfair to licensees who not only did not violate any laws, but obtained their present broadcast holdings with Commission approval.

11. Other opponents observed that adoption of the Department's suggestion would not mean the forfeiture of broadcast station licenses by nonrenewal of licenses. It was their opinion that the Department contemplated the imposition of a condition at renewal time that would provide for the orderly disposition of one or more of the licensee's stations in any market and that would furnish sufficient time to preserve fair values of broadcast properties.

12. Two opponents who were of the view that forfeiture was contemplated by the Department (Air Trails, Inc. et al., and Bloomington Broadcasting Corp. et al.), commissioned a study by M. H. Seiden & Associates, entitled "An Economic Analysis of the Impact of License Forfeiture on the Television and Radio Broadcasting Industry" which was filed with their reply comments. That study assumes that should the Commission extend its policy to license renewals, as suggested by the Department, it would do so by requiring forfeiture of licenses. It argues that imposition of a license forfeiture policy would cause substantial financial losses to investors in directly affected companies and the impact also would extend to broadcasting companies which are not directly affected. On the basis of revenues, cash flow, and other factors, it estimates the value of the 127 television stations in

the top 50 markets[3] with colocated radio affiliates at from $2.6 to $2.8 billion, and the value of 526 radio stations in these markets which would be affected by the proposed rule at from $447 to $477 million. The 127 television stations constitute 70 percent of the 184 television stations in the top 50 markets, while the affected radio stations constitute 73 percent of the approximately 715 radio stations in these markets. The study concludes that, if the license forfeiture principle is applied, the existing radio and television station owners would have to sell their plant and facilities at a fraction of the estimated value over more than $3 billion.

13. The study singles out for particular attention, publicly held companies involved in broadcasting. It estimates that 25 publicly held corporations own approximately 86 of the 291 radio and television combinations in the 50 major markets listed by the Department of Justice, and that about 9 percent of the stock of these publicly held corporations is held by institutions such as mutual funds and pension [342] funds. The holdings of institutions in companies whose broadcast stations represent a significant part of their total assets are valued at a minimum of $400 million, with an additional $1.2 billion being held in companies with a minor interest in broadcasting. It is argued that small investors in financial institutions would be adversely affected by a decline in the value of

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[3]The study states that it was limited to the top 50 markets to conform to the frame of reference set by the Department in the appendix to its comments which listed combined media ownership in those markets. It also says that extending the analysis to other markets would increase the magnitude of the impact of the proposed license forfeiture policy.

broadcasting properties. The study contains a letter from the Technology Fund, Inc. (formerly Television-Electronics Fund, Inc.), which values its holdings in broadcasting companies at about $11 million, of its total net assets of $637 million. The fund has 135,000 shareholders, with an average investment of about $4,700.

14. The study states that the policy of license forfeiture would more seriously affect the holdings of investors in smaller, undiversified broadcasting companies than those of investors in the larger, more diversified companies with broadcast interests, since the financial losses of the latter would constitute a smaller proportion of the companies' total assets. Moreover, a policy of license forfeiture would make financing very difficult for the smaller, undiversified broadcasting concerns, since bank loans would acquire a high degree of risk and bank regulatory authorities would probably prohibit loans to the smaller undiversified broadcast companies.

15. It is stated that given their choice, multiple owners would prefer to lose their least profitable properties, namely the AM or FM radio station. However, some of the latter will not attract investors and will consequently be idled, it is said, and even if investors are attracted they may not be as well qualified to operate the station as the incumbent. Moreover, the report says, under the Department of Justice proposal, multiple owners will not have the option of disposing of their least profitable stations, since competing applicants will apply for the most profitable property, which is generally the television station.

16. The study concludes that because of its greater impact on smaller undiversified broadcast companies, a

license forfeiture policy would succeed only in concentrating the broadcast industry further in the hands of the larger diversified broadcast companies.

17. With regard to the statement, in the aforementioned study, that under the Department's proposal multiple owners would not have the option of disposing of their least profitable stations, one may compare the views of NBC which were that if the proposal were adopted many of the 1,300 FM stations licensed to owners of AM stations would transfer or turn in their FM licenses if that were necessary to avoid nonrenewal of their AM licenses. Similarly, it stated, hundreds of AM licenses might be transferred or turned back to avoid nonrenewal of licenses of television stations co-owned in the same market.

18. NBC also stated:

> If new policies are to be adopted applicable to present ownerships, divestiture—not forfeiture—would be the only permissible remedy. However, in either event the result will be that the less profitable stations (many of which actually lose money)—AM and FM stations—will be separated from each other and from their generally more profitable television counterparts. Since about 75 percent of the FM stations are owned by AM licensees in the same market, and since hundreds of AM licensees also have television licenses in the same market, this will badly hurt the public service performed by those two radio services. New [343] investors would have to consider the present lack of substantial profits in radio generally, the additional costs resulting from separate operation of the stations, as well as the degree of risk of an investment in a business where the regulator so precipitously reverses its own long-standing policies

> and threatens the businesses of those who have pioneered the industry and their legitimate successors.

19. Finally, it may also be mentioned that NBC presented figures to show how small the market shares of the largest owners of mass media are in the five major markets where it owns television stations. It went on to say:

> In effect, the Department is seeking a rule requiring divestiture (if not forfeiture) in the absence of any showing either of monopoly power or of any restraint of trade and, indeed, despite the fact that the market concentration at which the rule is directed does not even present the incipient threat to competition that might be found to violate section 7 of the Clayton Act if a merger or acquisition were at issue.[4]

Newspapers

20. The Department was not the only party to suggest that the Commission give consideration to commonly owned newspaper-broadcasting combinations in the same market. Thus, one party, E. Harold Munn, Jr., in commenting on our proposal, suggested that the rules, if adopted, not apply to markets under a certain size. However, he added the proviso that if a party owns a newspaper of general circulation in a market for which it is requesting broadcasting authorizations, then the rules should be applicable, even in smaller markets.

21. Mid-Illinois Broadcasting Co. et al., stated that our proposal was not equitable because it did not

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[4] In par. 27 of the first report and order we noted that the market shares might be larger than indicated by NBC.

include newspapers. It would, they said, have permitted a newspaper to acquire a full-time broadcast station in the same market, but a full-time AM station could not. It suggested that full-time facilities be defined as AM, FM, TV, and daily newspapers, and that future grants permit one entity to have two full-time facilities in a market.

22. Federal Broadcasting System, Inc., suggested that we give consideration to adopting rules that would assign weighted numbers to various mass media—newspapers, VHF, UHF, AM, FM, CATV—with newspapers having the greatest weight. It further suggested that, using such figures, a party should be permitted a specified total of points in any market. Using this method, it could be determined how many broadcast facilities a party would be permitted to own in a market.

23. The National Citizens Committee for Broadcasting urged that, to promote diversity of viewpoints, any rules adopted should prohibit common ownership of broadcast stations and newspapers in the same market because stations owned by newspapers tend to draw heavily on the papers for their news and editorial content. It also said that when stations are affiliated and share news-gathering facilities with newspapers, there is an unavoidable conflict of duty between them.

24. On the other hand, NBC stated that common ownership of newspapers and broadcast stations has contributed substantially to the development of radio and TV, and continues to contribute to the growth, stability, development, and quality of the mass media. The Rome Sen-[344]tinel Co., related that its newspaper profits have permitted the loss operations of its radio operations and that separate ownership would

eliminate the public interest advantages in having the news gathering facilities of the paper available to the stations.

25. Storer Broadcasting Co., observed that the notice of proposed rulemaking that began the instant proceeding (33 F.R. 5315 (1968)) implied that cross-ownership of newspapers and broadcasting facilities was one of the Commission's concerns since it referred to problems of diversification of the broadcast media "and of allied interests in other public opinion media." It then said that

> Newspaper ownership may well be a proper area of concern, and further exploration may prove fruitful, since there is some evidence that a combined major newspaper-AM-FM-TV operation may be used in an anticompetitive manner by unduly promoting one or more of the broadcast properties in the associated media under common control.

26. We have long been concerned with the particular problem of newspaper-broadcast joint control[5] as an important factor in the overall attempt to secure diversity in the control of broadcast facilities. It has now become clear that the most signficant aspect of the problem is the common control of television stations and newspapers of general circulation. For, the studies presented in this record and otherwise available are in full agreement that the public looks primarily to these two sources for its news and information on public affairs. Other broadcast services and other printed

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[5]See, for example, the 1941 rulemaking proceeding in which it was decided to treat the question on a case-by-case basis (6 F.R. 1580, 3302 (1941); 9 F.R. 702 (1944)).

publications are substantially less significant in this respect.[6]

27. The various groups which have studied the degree of public reliance on various forms of communications—television, radio, newspapers, magazines, other people or sources—are unanimous in the conclusion that television and the daily newspaper of general circulation are preeminent in importance. Thus, the Roper Research Associates 1969 Report on public attitudes towards television and other mass media (a 1959-68) study) shows that 59 percent of the people surveyed stated they depended on television as their source of most news in November 1968, up from 51 percent in December 1959.[7] Newspapers were second as a primary news source, with 49 percent reliance in November 1968, a drop from a 57 percent figure in December 1959. The other three categories which Roper used—radio, magazines and people—are now significantly less important than television and newspapers as primary sources of news. Radio led this group with 25 percent public reliance in November 1968, a drop from 34 percent in December 1959. However, radio percentages remained at an average of about 20 percent above magazine and people as primary news sources.

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[6]As the authorities cited in par. 16 of the first report and order (par. 3, supra) demonstrate, control of the sources of information and views on public issues is significant even though there may be an absence of any definitive measurement of the degree to which mass communications actually influence thought and behavior.

[7]This figure varied some from time to time. Thus, it was as high as 64 percent in January 1967.

28. Gary A. Steiner, in "The People Look at Television" (1963), found that the majority of the people surveyed considered television and newspapers as the most important primary sources of news, compared with magazines and radio. Steiner broke his survey group into [345] categories of age, income, and size of city (location). Within this breakdown, the majority dependence on television and newspapers varied between the two with age, income, and size of city. The percentage of people depending primarily on television decreased at age 40 and over, and dependence on newspapers increased at that point. At income levels below $5,000 there was a greater dependence on television for news than on newspapers. This reliance was reversed at income levels above $5,000. However, what is most significant is the overall substantial preference for television and newspapers as new sources.[8]

29. Finally, in an area study in Milwaukee, "Media And Non-Media Effects On The Formation Of Public Opinion," 1969, filed in this proceedings by the National Association of Broadcasters (NAB), the American Institute for Political Communication reported that approximately 80 percent of the people

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[8]Interestingly, in cities of 100,000 to 1 million or more, a greater percentage of those surveyed considered newspapers as a more important news source than television. This preference was also reflected in towns of less than 2,500 and in urban fringe areas. Cities of 2,500 to 100,000 and open country areas placed a greater reliance on television as a news source than on newspapers. Other questions indicated that radio is more important than newspapers for bringing the latest news more quickly, and that radio and television were close, and below newspapers, on completeness.

surveyed relied on newspapers and television as their primary sources for news. They found as follows:

Table X.—*Which medium—radio, television, newspapers or periodicals—do you get most of your news from? From which the least?*

	Newspaper	Television	Radio	Magazine	No opinion
GENERAL PANEL					
Medium most news gotten from	47.2	35.8	12.9	3.2	0.09
Medium least news gotten from	5.9	9.2	37.1	44.8	3.0
LEADERSHIP PANEL					
Medium most news gotten from	79.2	12.6	4.1	4.1	0
Medium least news gotten from	0	16.6	41.7	41.7	0

30. As the Department of Justice's comments indicate, the incidence of common ownership of television stations and newspapers is high. In the top 50 markets, which the Department studied, they found 34 cities where a single owner controls at least one television station and one newspaper. These 34 television stations are controlled by, or control, 52 newspapers, since there is frequent joint control with papers in the same city. For example, in Baltimore, WBAL-TV is licensed to the Hearst Corp., which owns the News-Post and Sunday American. In Chicago, the Tribune Co. is the licensee of WGN-TV and also publishes the Chicago American and Chicago Tribune. In Wheeling, W. Va., WTRF-TV is affiliated with the Wheeling Intelligencer and the News Register.

31. Our research on newspaper-television joint interests as of November 1969 indicates that 94 television stations are affiliated through common control with newspapers in the same city. In addition, of course, some newspapers own television stations in other cities which also serve the city in which the newspaper is located.

[346] 32. In view of the primary position of the daily newspaper of general circulation and the television broadcast station as sources of news and other information, and discussion of public affairs, particularly with respect to local matters, it is not desirable that these two organs of mass communication should be under the same control in any community. A direct parallel would be the ownership of two television stations in the same community by the same person, which the Commission without substantial disagreement from any source, has never permitted. The functions of newspapers and television stations as journalists are so similar that their joint ownership is, in this respect, essentially the same as the joint ownership of two television stations.

THE PROPOSAL

33. As stated previously, the record in this proceeding has led us to the view that amendments to the multiple-ownership rules that would eliminate newspaper-broadcasting, or broadcasting, combinations in the same market may be in the public interest. Thus, for the purpose of promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints, we are proposing to adopt rules that would require divestiture of broadcast-

ing or newspaper holdings. Although we do not set forth the specific terms of such rules, we are setting forth their substance and a description of the subjects and issues involved, pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §553(b)(3) (1966).

34. The rules which we propose would be aimed at reducing common ownership, operation, or control of daily newspapers and broadcasting stations within the same market. They would require divestiture, within 5 years, to reduce holdings in any market to one or more daily newspapers, or one television broadcast station, or one AM-FM combination. Under the provisions of the rules, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned there within 1 year or by the time of its next renewal date, whichever is longer. No grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market.

35. To begin with, our proposal would result in separate TV interests, and separate newspaper interests, but would permit interests in combined AM-FM operations in the same market. This division of media has three bases. First, a study commissioned by NAB, entitled "The Effects of Common Ownership Media Content and Influence," by George H. Litwin and William H. Roth, was filed in this proceeding by NAB. Among other things, that document summarized studies showing the relative influence of various media and suggested that the influence weight of TV was slightly greater than that of newspapers, but that each of those media had influence weights of more than twice that of AM and FM combined.

36. Second, it appears that the total expenditures by advertisers in the various media on a national basis in the years 1964-68 have been as follows: Newspapers have received from about 4.1 to 5.2 billions of dollars per year; television from about 2.3 to 3.1 billions; and radio [347] from about 0.8 to 1.1 billions (Television Factbook, Services Volume, 1969-70 Edition, No. 39, p. 71-a). Hence in terms of advertising revenues, newspapers and television each substantially exceed radio. Third, financial information reported to the Commission indicates that FM stations generally operate at a loss (see first report and order, par. 48). In view of the foregoing, it appears that from the standpoint of influence on the community, as well as that of competition, not to mention financial realities that favor combined AM-FM operations, such combinations should be permitted—at least at the present time.

37. Under the rules adopted today in the first report and order, divestiture is, of course, not required. In view of this, our approach to AM-FM combinations in the same market was somewhat more stringent than that proposed here because of the desire to produce as much diversity as possible under the circumstances. Thus, AM-FM combinations could be sold to a single purchaser only on a showing by the seller that for economic or technical reasons the stations were so inter-dependent that they could not be sold separately.

38. We also stated in that document (note 17) that it was our intent to study further the matter of AM-FM combinations, in the light of the view, expressed by us on various occasions in recent years, that FM should not be an adjunct or supplement of AM, but that both AM and FM should be integral parts of a total aural service. We therefore invite comments on this subject

generally, and specifically on whether divestiture should be required with regard to AM-FM combinations so that no party could own such a combination unless he had made a showing that the two stations were, for economic or technical reasons, so interdependent that one could not be sold separately.

39. It may be noted that the Seiden argument about impact (pars. 12-16, supra) is based on the premise that forfeiture of licenses would be required and that this would often involve the loss of licenses to competing applicants at renewal time or distress sales of stations at a fraction of their value. Our proposal, however, is one of divestiture and not forfeiture, as may be seen, for it will give a period of 5 years in which to dispose of excess properties.[9]

40. It could reasonably be supposed that broadcast companies would make an effort to sell or exchange their stations prior to the expiration date. Since many broadcast companies would find themselves under the same necessity of disposal, station exchanges on a wide scale could no doubt be effected. No significant overall losses for the affected broadcast companies would result from such exchanges. In addition, the existence of alternative exchange opportunities would generally insure that such outright sales of stations as are made

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[9]Divestiture has been required before by the Commission. For example, the forerunner of the present duopoly rules was sec. 3.35 which proscribed common ownership of more than one AM station rendering primary service to substantial overlapping areas. When it was adopted Orders 84-A and 84-B, F.R. 16065 (1943), 9 F.R. 3860 (1944)), licensees were required to dispose of AM facilities to meet the terms of the rule, although provision was made for exceptions if the public interest was considered to be served by such multiple ownership (11th Annual Report, F.C.C., p. 12 (1945)).

would not take place at distress prices. Moreover, sales taking place pursuant to rules requiring divestiture would be certified by the Commission to be necessary, within the meaning of section 1071 of the Internal Revenue Code of 1954, as amended, to effectuate the Commission's new multiple-ownership rules, with resultant tax advantages.

[348] 41. Under these conditions, losses to investors should be minimal, and the prospect of increased concentration of control of the broadcast industry flowing from higher risk and financial difficulties, most unlikely. Indeed, even under the most extravagant assumptions of license losses and/or distress sales, the losses to small investors in mutual funds and pension funds would appear to be slight. It may be assumed from the former name of the mutual fund mentioned by Seiden (Television-Electronics fund) which described the status of its broadcast investments, that compared with most mutual funds, it has an unusually large proportion of its funds invested in broadcasting. Yet the value of its broadcasting securities accounted for less than 2 percent of its net assets, the bulk of which no doubt consisted of holdings in television stations (which are least likely to be sold in anticipation of divestiture).

42. Although our views expressed in the immediately preceeding paragraphs suggest that divestiture may not be too disruptive, this does not mean that we are without substantial concern about the possible effects of separating the present co-located combinations, that is, radio-TV, radio-newspaper, TV-newspaper, TV-radio-newspaper, on the service to be rendered by the individual units after divestiture (see, for example, pars. 18-19, supra).

43. Such combinations are widespread. If stations or newspapers after divestiture were to become marginal or unprofitable, compared to a healthier status when combined, their service to the public would obviously deteriorate. Such situations might result from the loss of current savings in costs from the use of common facilities and personnel. They might also result from the loss of the financial support that an unprofitable station or newspaper receives from its profitable affiliate.

44. Quantitative information on cost savings and the effects of loss of such savings would be especially welcome in comments, as would information about financial support given to unprofitable affiliates. Comments are also invited on the Seiden arguments presented above, and our evaluation of impact in paragraphs 39-41. In this connection, specific cases that would have an impact on small investors would be helpful to our consideration.

45. As stated, our proposal is one of divestiture and not forfeiture. In connection with the question of impact, comments are invited on such questions as to whether a period of 5 years is too short or too long, and whether divestiture should take place in stages to cushion the impact. As to stages, for example, the National Citizens Committee for Broadcasting has suggested as a first step the limiting of networks to one station in a market because of their dominant position in the largest markets. As a second step, it suggested divestiture in communities where there are few communications media or where there is a concentration of media in a few hands. Comments on these suggestions are invited as are suggestions for other ways of cushioning the impact.

46. By the term "daily newspapers" in our proposal, we mean daily newspapers of general circulation that are published in the market in question. We do not mean daily newspapers of general circulation [349] in the market that are not published in the market. This leads to the question of the meaning of the term "market." In the rules adopted today in the first report and order, we carried forward the concept of overlapping service contours of broadcast stations that had been used under the previous duopoly rules. Hence common ownership of stations with overlapping of such contours is proscribed. Our reasons for doing this were stated there.

47. However, under the rules that we propose today, a new element is presented by the fact that newspapers do not have service contours. Comments are invited on how market should be defined for the purposes of the rules we propose. One approach would be to hold that common ownership of broadcast facilities and a daily newspaper of general circulation would be proscribed if the newspaper is published in a community lying within a specified contour of a broadcast station.

48. No doubt, many will challenge our authority to adopt the rules proposed. Comments or legal briefs on the subjects would be most welcome.

49. In the rules adopted today, we discussed the subject of minority cross-ownership interests (first report and order, pars. 69-73). We see no reason why the approach mentioned there should not be carried over into the rules proposed herein. Comments are, of course, invited.

50. The fact that we have requested comments on specified matters mentioned above is not meant to limit

discussion in any way. Interested parties are invited to comment on any and all aspects of our proposal.

51. Authority for the adoption of the proposed amendments is contained in sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

52. Pursuant to applicable procedures set out in section 1.415 of the Commission's rules and regulations, interested parties may file comments on or before July 15, 1970, and reply comments on or before August 17, 1970. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it in addition to the comments invited by this further notice. The aforementioned substantial period of time in which to file comments is being provided in view of the importance of the proposal herein.

53. In accordance with the provisions of section 1.419 of the rules and regulations, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission.

Federal Communications Commission
Ben F. Waple, *Secretary.*

CONCURRING AND DISSENTING STATEMENT OF CHAIRMAN DEAN BURCH

Since I both concur and dissent, a brief statement of my views is called for. The basic issue in this proceeding—diversifying sources of programming—is a

most important one. I would not, however, give priority to breakup of aural-visual services.

[350] As an initial matter, I would note again my strongly-held view that providing the regulatory climate which will assure implementation of program origination by CATV systems (including channels for common carrier usage), over-the-air pay-TV, use of satellites for new broadcast and cable networks, and a really properly financed educational service, should be assigned top priority, because that is by far the best and most effective way of obtaining maximum diversity of programing. However, putting that aside and turning to this proceeding, I submit that it is flawed.

The Commission has been considering solely the question of future acquisitions, by new application or purchase, of TV-AM-FM combinations in the same market. Where there are only a few aural services, this may be a significant issue (although often in areas of sparse population, only the multiple owner will come forward to provide UHF or FM service). But in the great majority of cases, it is not a pressing issue. The reason is obvious: In the Washington metropolitan area there are 37 aural services; in New York, 59; in Chicago, 61, and so on. There is a plethora of aural services in all significant markets. Thus, while separating TV from AM or FM might make a contribution in a few cases, it is clearly far from the heart of the problem. The plain fact is that the Commission has labored for over 2 years, received reams of comments, heard extensive argument, only to bring forth a rule which applies to areas of ownership least needing attention, if at all.

Clearly, the media cross-ownership matter warranting the most attention is that of VHF-TV and the daily

newspaper. There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then is the guts of the matter. As far as I am concerned, if there is any threat of undue concentration, and I have of course reached no final conclusion on this score, it does not lie in cross ownership of AM-FM-TV.

As I said, I obviously have not made up my mind on local cross-ownership of VHF-TV and the daily newspaper. Let's face up to the fact that if we are going to inquire into concentration, we should have started at the most obvious point.

I have heard my colleague, Commissioner Robert E. Lee, set forth views concerning the stability of the newspaper owner—that such an owner does not "traflick" and does a better job of serving as an outlet for local expression. These factors and many others have to be explored in the proceeding, and, as I stressed, I remain openminded on the issue. My point here is simply that that is the issue.

The majority do not, I think, dispute the greater importance of the issue. As I understand it, their position comes down to this: "Perhaps we did omit the most important aspect from the rulemaking; however, we must act now as we can, and then consider other aspects in the further proceeding" (again, I note, with the issue of the aural-TV cross-ownership having equal footing with the much more important issue of TV-newspaper).

[351] I recognize that this position is not without some substance. It sounds good in theory, but pragmatically it fails. The action is a prime example of bureaucratic tinkering to no effect. The capacity of our agency to take action on complex, difficult, much controverted matters should not be exhausted by continual actions which chop away at the system little by little rather than going straight to the heart of the matter—to find if there is a problem and, if so, to cure it.

I join in that portion of the action which looks belatedly to consideration of the heart of this problem, but I would dissent to going forward with any across-the-board rule prohibiting the acquisition, either by new application or assignment of aural and visual services in the same market, or any proposal looking toward divestiture of aural-visual services.

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

I wish to make clear that I have not made up my mind on the entire question of divestiture in the broadcast field alone or in the area of broadcasters with newspaper ownership. In the latter field, I wish to stress that I remain openminded on this entire question. Over the years, I have been impressed with the overall record of newspaper-owned broadcast facilities both in their stewardship to this Commission and the public which they serve. This entire issue has received increased attention by many parties both in and out of Government. Accordingly, I believe a complete and up-to-date record is now required on this most important matter.

DISSENTING STATEMENT OF COMMISSIONER WELLS

(Docket 18110—Further notice of proposed rulemaking)

I dissent to issuance of this further notice of proposed rulemaking for the reasons stated in my dissent in the first report and order in this docket.

[22 F.C.C.2d 768] FCC 74-222

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
Amendment of Sections 73.35, 73.240 and	)	Docket
73.636 of the Commission's Rules	)	No.
Relating to Multiple Ownership	)	18110
of Standard, FM and Television	)	
Broadcast Stations	)	

MEMORANDUM OPINION AND ORDER

(Adopted February 28, 1974; Released March 7, 1974)

By the Commission: Commissioner Reid concurring in the result.

1. The Commission has before it the comments and replies filed in response to the Further Notice of Proposed Rule Making in this proceeding adopted March 25, 1970, 22 F.C.C.2d 339.

2. The proposal in the Further Notice would require divestiture, within five years, to reduce one party's media holdings in any market to one or more daily newspapers, or one television broadcast station, or one AM-FM combination. Under the proposal, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned in that market within one year or by the time of its next renewal date, whichever is longer. No grants for

broadcast station licenses would be made to owners of one or more daily newspapers in the same market. Comments were also invited on whether divestiture should be required with regard to AM-FM combinations so that no party could own such a combination unless he had made a showing that the two stations were for economic or technical reasons so interdependent that one could not be sold without the other. There were two major concerns which led to the proposal. The first was the Commission's recognition of the need for diversity in sources of information on topics of public importance and the Commission's conclusion that it was necessary to explore whether adequate diversity is available. The second had to do with the question of economic concentration.

3. In response to the Further Notice, a large number of parties submitted comments including studies of the impact of newspaper-television cross-ownership on public access to divergent opinions on topics of public importance, the economic consequences of divestiture, and the effects of common ownership on competition and station performance. Although the proposal to require the separation of ownership of co-located daily newspapers and television stations received the most attention by the commenting parties, other points were also addressed.

4. The material submitted has been helpful in providing the Commission with a basis for arriving at decisions in this proceeding. How-[769]ever, there are certain areas concerning which it believes that additional information would facilitate the decision-making process. The Commission also believes it is in the public interest to develop such information by means of oral arguments and perhaps panel sessions as well as by

affording interested parties an opportunity to file updating or elaborating materials. We do not mean to imply that material concerning areas not mentioned below would be unwelcome. Rather, we believe that in view of the record already established, the time and energies of interested parties and of the Commission could be more profitably spent by concentrating on the topics highlighted below.

5. In issuing the Further Notice of Proposed Rule Making in this proceeding, the Commission observed that the most significant aspect of the common ownership problem was that of co-located newspapers and television stations, both from the point of view of diversity of viewpoints and that of competition for advertising revenues. We are still of that opinion. Considering the controversy engendered by our proposal on that subject, as well as its core importance, we invite parties to focus primarily on the newspaper-television station cross-ownership proposal. Although not meaning in any way to limit comment thereon, specific aspects to which remarks might be addressed are the following: If divestiture is required, should it be required in all markets? Should it be limited to markets of a specified size, to those with a specified number of separate media voices, or to those with specific patterns of distribution of advertising revenues? Should it be otherwise tailored to respond to local variations which exist in different markets? Should the time required for divestiture be five years as proposed, or a longer or shorter period? How should the term "market" be defined for purposes of the rule? Should it be defined differently for newspapers than for television stations? Should the proposed rule apply to UHF television stations if it is adopted?

6. With regard to the foregoing, and the topics mentioned below, although no doubt in some cases it may be difficult to fashion comments so as not to be repetitious of what has already been submitted in this docket, we believe that to the extent that written and oral presentations do not duplicate the present record the work of the interested parties and of the Commission will be more difficult. This is so because what is now in the record will of course be given careful consideration in arriving at final decisions and it need not be repeated.

7. While urging divestiture as to newspaper-television combinations, the Department of Justice suggests that it is unnecessary to break up radio-newspapers or radio-television stations in larger markets. It states that such cross-ownership should only be examined in the smaller markets, e.g., markets below the top 100, and that this examination should take place on an *ad hoc* basis to determine whether divestiture is necessary in particular cases. It also suggests that the creation of new radio-newspaper or radio-television combinations be prohibited in all markets and that sale of existing combinations to a single party should be proscribed.

8. Another commenting party, agreeing that divestiture of radio-newspaper or radio-television combinations in larger markets is un-[770]necessary, but viewing an *ad hoc* approach as inefficient and ineffective for smaller markets, suggests that smaller markets be handled by a general rule instead. This party would define the smaller markets as those below the top 100 or top 200, or acording to the number of radio stations in the market, and would take into account the types of radio stations in the market. The same party also suggests that as to radio-TV combinations, small

markets might be defined as those with a single TV station.

9. Thus, although we have arrived at no conclusions in this area, we would welcome comments on such questions as whether to proceed on a case-by-case method or by rule in smaller markets and on how small markets should be defined, whether a rule should be adopted prohibiting the creation of new radio-newspaper or radio-television combinations in all markets, whether a rule should be adopted proscribing the sale of such combinations to the same party, etc.

10. As to AM-FM combinations, it may well be that rather than requiring separate ownership, an appropriate route to follow would be that of permitting such cross-ownership but of amending our present AM-FM non-duplication rules, which prohibit more than 50% duplicated programming in communities of more than 100,000 population, by making them more restrictive. To this end, we shall in the near future issue a Notice of Proposed Rule Making intended to explore various possibilities for amendments of the rule.

11. Although we have previously expressed the intention of considering the problems of cross-ownership of co-located newspapers and cable television systems (Docket No. 18891) and cross-ownership of co-located newspapers and broadcast stations (Docket No. 18110) at the same time, we have on further consideration decided against this. There are, of course, similarities in the problems relating to the two types of cross-ownership, but there appear to be fundamental differences that suggest separate treatment might be advisable. For this reason, we do not now invite parties to submit written comments on the subject of newspaper-cable cross-ownership or to make oral

presentations on that subject. Such submissions or presentations may be requested at a later date.

12. As previously stated, both for up-dating and elaboration we would welcome supplemental written filings. Moreover, we would do so both from original or other parties. To permit these filings to be studied before oral argument takes place, we shall specify a deadline of May 1, 1974, for them. Oral argument will be held on June 18, 19 and, if necessary, June 20, 1974. This provides about 60 days for the submission of written material and allows us a short time in which to examine it before the oral argument. No one must file, but for those that do so, the usual requirement of an original and 14 copies shall apply.

13. May 1, 1974, is also the deadline for requesting an opportunity to participate in oral argument. For this purpose, parties should file separately from their comments an original and two copies of their request, referring to this docket and directing it to the attention of the Dockets Branch, Office of the Secretary. When filing, parties should [771] indicate who is to appear on their behalf and how much time is requested. Thereafter, the Commission will notify the parties of the schedule for oral argument. To the extent possible, parties will be given the amount of time requested. Since sufficient time may not be available, the Commission encourages parties wishing to present like views to join in a single presentation. As to panel sessions, the Commission will subsequently decide whether they will be held and, if so, on the precise format, timing and participants.

14. Accordingly, IT IS ORDERED, That oral argument IS SCHEDULED in this proceeding as outlined in the above discussion.

Federal Communications Commission,
Vincent J. Mullins, *Secretary.*

[50 F.C.C.2d 1046]

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of
Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Sandard, FM, and Television Broadcast Stations

Second Report and Order*

(Proceeding Terminated)

(Adopted January 28, 1975; Released January 31, 1975)

By the Commission: Commissioners Lee, Reid, and Washburn concurring and issuing statements; Commissioners Hooks and Robinson concurring in Part and Dissenting in Part and Issuing statements; Commissioner Quello Issuing a Separate Statement.

1. The Commission has before it the *Further Notice of Proposed Rule Making* in this proceeding (22 F.C.C. 2d 339 (1970)) and responsive filings by numerous parties. Also under consideration are updated written filings and additional information presented during two and a half days of oral argument, pursuant to an invitation of the Commission given March 7, 1974 (45 F.C.C. 2d 768). A list of filing parties appears in Appendix A.

*A synopsis of the actions taken can be found in Appendix G.

2. The proceeding began March 27, 1968, with the adoption of a *Notice of Proposed Rule Making* (33 Fed. Reg. 5315). Broadly speaking, the notice proposed rules proscribing common ownership of broadcast stations in different broadcast services in the same market (i.e., no common ownership of TV-AM, or TV-FM, or AM-FM).[1] The proposed rules were prospective in nature, i.e., they did not contemplate divestiture of existing facilities but were to apply only to applications to construct new facilities or to acquire existing facilities.

3. A *First Report and Order* was adopted on March 25, 1970 (22 F.C.C. 2d 306). The rules promulgated therein were modified somewhat in a *Memorandum Opinion and Order* adopted February 26, 1971 [1047] (28 F.C.C. 2d 662), which disposed of petitions for reconsideration of the *First Report and Order*. These new rules prohibited common ownership of VHF television stations and aural stations in the same market. They permitted AM-FM combinations and they provided that all applications involving common ownership of UHF and aural stations

[1] Before the proceeding was initiated, the rules governing common ownership of broadcast stations in the same market prohibited such ownership in the *same* broadcast service if certain coverage contours overlapped. They permitted common ownership of stations in *different* broadcast services in the same market. Hence a single licensee was permitted to own an AM-FM-TV combination licensed to serve the same community. Moreover, the rules contained no prohibition of common ownership of newspapers and broadcast stations in the same market. However, as a matter of policy expressed in the Commission's multiple ownership rules and elsewhere, the Commission did examine concentrations of ownership in the same geographic area on an *ad hoc* basis in both comparative and non-comparative situations. These examinations gave consideration to broadcast and non-broadcast interests, such as newspapers.

would be treated on a case-by-case basis. They did not require divestiture, but did require that if the owner of a VHF station and one or two aural stations in the same market sold, he could not sell the TV and the aural stations to the same party. They did not cover common ownership of newspaper and broadcast stations.[2]

4. On the same date that the *First Report and Order* was adopted, the Commission also adopted a *Further Notice of Proposed Rule Making* (22 F.C.C. 2d 339) which contained a proposal as to common ownership of broadcast stations and of daily newspapers and broadcast stations in the same market. The proposal would require divestiture, within five years, to reduce one party's holdings in any market to one or more daily newspapers, or one television broadcast station, or one AM-FM combination. Under the proposal, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned in that market within one year or by the time of its next renewal date, whichever is longer. No grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market. Comments were also invited on whether divestiture should be required with regard to AM-FM combinations so that no party could own such a combination unless he had made a showing that the two stations were for economic or technical reasons so interdependent that one could not be sold without the other.[2]

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[2]Under these rules, a TV station and an AM station were considered to be in the same market if the Grade A contour of the TV station encompassed the entire community of license of the AM station or if the 2 mV/m contour of the AM station encompassed the entire community of license of the TV station. With regard to

[footnote continued]

5. Although not unprecedented, the idea of divestiture of ownership was a departure from the typical Commission approach of limiting any new rules to prospective effect. As a consequence of the incorporation of this facet of the proposal, the question of the impact on industry structure was introduced. Moreover, because of the differences between prospective and retrospective proposals, each needs to be examined separately and tested against appropriate criteria.

6. *Response to the Proposal.* As could be expected, our proposal generated a great deal of interest and provoked a sizable number of [1048] filings. Most were directed to the question of newspaper-broadcast ownership, with most parties opposing rule changes but a

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TV and FM stations, the Grade A contour was used for TV and the 1 mV/m contour was used for FM. As to AM-FM combinations, they were considered to be in the same market if the 1 mV/m contour of the FM station encompassed the entire community of license of the AM station or if the 2 mV/m contour of the AM station encompassed the entire community of license of the FM station.With certain exceptions, the *First Report and Order* proscribed the formation of new AM-FM combinations in the same market and prohibited the sale of such an existing AM-FM combination to a single party unless a special showing were made that for technical or economic reasons the stations had to be operated in combination. The aforementioned *Memorandum Opinion and Order* (at 670-672) reversed the prohibitions against forming AM-FM combinations or selling existing combinations to a single party. In so doing it indicated that the subject of common ownership of AM and FM stations in the same market would be explored in the phase of the proceeding commenced by the *Further Notice of Proposed Rule Making.* It also indicated that, as an effective alternative to diversification of ownership, the Commission intended to explore the possibility of amending the AM-FM program duplication rule (§73.242) *in such a way as to* provide more non-duplicated programming over commonly owned AM and FM stations in the same area. A proceeding has since been begun to explore this possibility (*Notice of Proposed Rule Making,* Docket No. 20016, 39 Fed. Reg. 14228 (1974)).

number supporting them. Some approached the issues from the point of view of anti-trust economic analysis; others stressed the diversity of viewpoint aspect. In addition, some parties discussed AM-FM combinations or television-radio combination divestiture.

7. Factual differences between situations also affected the nature of the views expressed in a filing. Thus, for example, as to newspapers, at one end of the continum was the daily newspaper-television combination which faced multiple competitors of both media, and at the other end was the joint holding of the only TV station and daily newspaper in a market. Whether in terms of economics or viewpoint diversity, parties differed on the weight to be given other media (for example news magazines) received in the market but originating elsewhere. So too with the weight to assign other local media such as weekly newspapers and outdoor advertising or direct mail. Although important factual differences were noted, a parallel method of evaluating the situation regarding daily newspaper-radio combinations could be found in the pleadings.

8. *Legal Authority.* The *Further Notice* (at para. 48) invited comments or legal briefs on the Commission's authority to adopt the proposed rules. Several parties responded to this invitation concisely or at length. We have concluded that we have authority to adopt the rules both as proposed and as promulgated by the present document. A discussion of this subject follows:

9. The Commission has authority to adopt rules governing the issuance of broadcast licenses which would prohibit cross-ownership of newspapers and broadcast stations in the same area in furtherance of our long standing policy of promoting diversification of ownership of the electronic mass communications media. Statutory authority is found in Sections 2(a), 4 (i),4(j), 301;303, and 309

(a) of the Communications Act of 1934, as amended. Section 309(a) specifically requires the Commission to find that the granting of a license serves the public interest, convenience, and necessity. The term public interest encompasses many factors including "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States,* 326 U.S. 1,20 (1945).

10. Our diversification policy is derived from both First Amendment and anti-trust policy sources. See, e.g., *Associated Press v. United States,*326 U.S. 1 (1945), *supra,* affirming 52 F. Supp. 362 (S.D.N.Y. 1943) (L. Hand. J.); *Citizens Committee to Save WEFM v. FCC,* ——F. 2d ——— , (D.C. Cir., Oct. 4, 1974), (concurring opinion of Bazelon, C.J. at 6). The Federal Courts have consistently upheld our use of these grounds in efforts to promote diversity of control over the electronic media of mass communications. In its earliest opinions construing the Communications Act, the Supreme Court recognized that regulation of broadcasting was designed to preserve competition and prevent monopoly. *F.C.C. v. Pottsville Broadcasting Co.,* 309 U.S. 134, 137 (1940); *F.C.C. v. Sanders Bros. Radio Station,* 309 U.S. 470, 474-76 (1940). The Supreme Court said in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390: "It is the purpose of the First Amendement to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization [1049] of that market, whether it be by the Govenment itself or a private licensee." The Court then concluded: "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S.

at p. 390. In *Mt. Mansfield TV Inc. v. FCC*, 442 F. 2d 470 (2nd Cir. 1971) the Court upheld our prime time access rule as being consistent with our obligations under the First Amendment to promote diversity of program sources.

11. Although the Commission is not empowered to enforce the anti-trust laws, it may properly take cognizance of anti-trust violations and anti-trust policy in performing its public interest licensing function. *United States v. RCA*, 358 U.S. 334 (1954). In expanding on this point in RCA, the Supreme Court said in dicta:

> Moreover, in a given case the Commission might find that anti-trust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication. See 98 Cong. Rec. 7399; *Mansfield Journal Co. v. FCC*, 86 U.S. App. D.C. 102, 107, 108; 180 F. 2d 28, 33, 34.

Anti-trust policy has been recognized as a correlative source of authority for overdiversification policy because requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices. However, these two sources of our diversification policy are not always present to the same extent nor do they apply with equal force in every case. Our prospectively-applicable rule with respect to future newspaper-broadcast combinations in the same city draws its support principally from our First Amendment concern. Our divestiture order applied to "egregious" cases in which the only newspaper and the only broadcast station in a city are co-owned is

founded upon both concerns. While we have proceeded by a different course than one based strictly on a market analysis, the fact is we have in effect used a geographic market in writing our new rules and have considered daily newspapers and stations as part of the same product market.

12. In November 1953 we adopted rules limiting the number of broadcast stations a person could own to five VHF television stations and seven AM and FM stations. We asserted authority to make regulations limiting concentration of stations under the same control. The United States Supreme Court upheld these regulations in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

13. In recent rule making proceedings the Commission has adopted rules prohibiting networks from having any cable interests and telephone companies from owning cable systems in their service areas. The Courts accepted our action in both instances. *Iacopi v. F.C.C.*, 451 F. 2d 1142 (9th Cir., 1971); *General Telephone Co. of the Southwest v. U.S.*, 449 F. 2d 846 (5th Cir., 1971).[3]

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[3] The issue in *Iacopi* was whether a divestiture plan complied with our rules rather than a direct attack on the validity of the rule itself. However, the Court did say: "The Commission has determined that network divestiture of CATV and syndication interests will increase competition and foster independent sources of TV programming. We defer to that interpretation." 451 F. 2d at 1147. See also the concurring statement of Judge Tamm of the United States Court of Appeals for the District of Columbia. "The pending rule making proceedings (Docket No. 18110) offer some hope that the Commission will finally come to grips with the grave problem inherent in the rising concentration of ownership in the mass media." *Hale v. F.C.C.*, 425 F. 2d 556, 566 (D.C. Cir., 1970).

[1050] 14. The sound public policy of placing into many, rather than a few hands, the control of the broadcast medium guides us in the licensing of the use of the radio spectrum. This basic principle, enforceable in *ad hoc* proceedings or through rule making, applies to the judgment of whether an individual application should be granted as well as to the comparison of competing applicants. *United States v. Storer Broadcasting Co., supra; Clarksburg Publishing Co. v. F.C.C.*, 96 U.S. App. D.C. 211, 225 F. 2d 511 (1955); *Scripps-Howard Radio, Inc. v. F.C.C.*, 89 U.S. App. D.C. 13, 189 F. 2d 677 (1951), *Cert. den.* 342 U.S. 830; *Plains Radio Broadcasting Co. v. F.C.C.*, 85 U.S. App. D.C. 48, 175 F. 2d 359 (1949). It is the policy behind our one-to-a-market rules adopted in the *First Report and Order, Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 F.C.C. 2d 306 (1970). The significance of ownership from the standpoint of "the widest possible dissemination of information" lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest.

15. Despite the overwhelming authority supporting our proposed action, numerous parties have challenged our jurisdiction to take any action interfering with the rights of newspapers to own broadcast stations. The American Newspaper Publisher's Association (ANPA) advanced the major legal arguments against such a rule in their exhaustive and comprehensive filings with the Commission.

16. They first challenge our authority on constitutional grounds citing the First and Fifth Amendments to the

United States Constitution. ANPA claims we are attempting to inhibit a newspaper owner's freedom to publish by preventing him from having an interest in broadcast stations. This argument fails for two reasons. First, the Commission is following the long established policy of promoting the widest possible dissemination of information from diverse and antagonistic sources . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Second, the First Amendment does not protect business relations that are either unlawful or not in the public interest. Finally, we believe the opponents overstate their case in this and in the other arguments. The Commission has never proposed and is not now proposing to prohibit someone from owning a newspaper and a television station. It is plain that what we are doing is grandfathering present newspaper-television owner combinations; we are only requiring divestiture in egregious cases (see Appendix D and paras. 112-122, *infra.*) These divestitures are to take place over a five-year period and in order to avoid any possible future harm, we shall entertain waiver petitions.

17. ANPA contends such rules violate the Fifth Amendment because we are discriminating against a class. Rules that treat in an equal manner all parties whose activities raise similar public interest problems are not discriminatory. Since broadcast licenses confer no property rights, the Commission may cancel them provided it affords due process to the licensee. *Radio Commission v. Nelson Bros. Radio*, 289 U.S. 266 (1933). Discrimination is by definition, the arbitrary and capricious classification of entities by irrelevant standards. *Bolling v. Sharpe*, 347 U.S. 497 (1954). We need not confer licenses on a carefully [1051] defined class provided that we determine our action is consistent with the public interest.

18. The ANPA brief also cites an opinion by former General Counsel Hampson Gary, written in 1937, purporting to hold the Commission cannot deny a broadcast license to someone solely on the ground they published a newspaper. That opinion is not relevant to the consideration of Docket No. 18110 for four reasons. First, it was written in the context of a comparative proceeding. Second, it dealt with the broader question of *any* newspaper as opposed to the more limited consideration of one city. Third, prior statements by a regulatory agency as to its jurisdiction are not determinative of the legality of subsequent efforts to assert the same jurisdiction.[4] Finally, the problems of cross ownership and concentration of media ownership are much different in 1974 than in 1937.

19. The opponents of the adoption of the rules have called to our attention several attempts by Congress in the early fifties to prohibit the Commission from "discriminating" against newspaper owners in license proceedings. They contend Congress failed to enact legislation because of assurances by the Commission that it had no intention of "discriminating."

20. The opponents are apparently referring to then Chairman Hyde's testimony during hearings on the 1952 Amendments to the Communications Act. In view of the fact that the Commission prior to this testimony had taken newspaper ownership into account in denying applications, *Scripps-Howard Radio, Inc. v. F.C.C.*, *supra* and *Plains Radio Broadcasting Co. v. F.C.C.*,

[4] See e.g., *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 169-170 (1968). The Commission once had doubts about its own jurisdiction in thefield of CATV but changed its position in the mid-sixties.

supra, the then Chairman's testimony could not have reasonably been taken as an indication that newspaper ownership by a potential licensee was of no concern to the Commission. It is also clear that an agency's view of the extent to which its public interest mandate requires it to take newspaper ownership into account can change over the years. Thus, the Chairman's testimony in 1952 concerning the Commission's views on what policy best serves the public interest does not mean that the agency is excused from its continuing responsibility to seek to further the public interest which may cause it to reach a different conclusion twenty-two years later. Finally, it should be noted that our proposed action does not bar newspapers as a class from becoming licensees. We merely propose to prevent common ownership in the same area. Thus, we believe it is impossible to discern any mandate from either Congress' action or inaction.

21. Several Court cases are cited in support of our lack of authority to promulgate these rules. In *Tri-State Broadcasting Co. v. F.C.C.*, 96 F. 2d 564 (D.C. Cir., 1938) the court stated it knew of no rule or statutes prohibiting a newspaper from owning a radio station. We fail to see how this justifies a ban on our promulgating such a rule. ANPA relies most heavily on *Stahlman v. F.C.C.*, 126 F. 2d 124 (D.C. Cir., 1942). That case upheld our authority to issue a subpoena as part of our investigatory powers. It also contained considerable dicta such as "there is nothing in the Act which either prevents or prejudices the [1052] right of a newspaper, as such to apply for and receive a license to operate a radio broadcast station." 126 F. 2d at 127. This statement deals with newspaper owners in general and is not related to the issues in this proceeding. Judge Edgerton noted in a concurring opinion that the court was not deciding the issue of crossownership.

proceeding. Judge Edgerton noted in a concurring opinion that the court was not deciding the issue of crossownership.

22. ANPA also cites the case of *McClatchy Broadcasting Co. v. FCC*, 239 F. 2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) where a newspaper owner seeking a television station in the same city lost in a comparative proceeding. The Court said newspaper ownership was not a *disqualifying* factor standing alone but the case did not deal with that issue in a rulemaking proceeding.

23. Finally, the opponents have said we do not have authority to order immediate divestiture and that even if we did, such a remedy is so harsh it should be sparingly used. This argument begs the question. The Commission has a very unusual licensing scheme in that unlike other agencies, we must re-evaluate each license every three years. We cannot renew a license unless we determine that to do so is in the public interest. In this connection we have determined that in certain egregiously concentrated markets the public interest requires divestiture. However, we have applied the divestiture over a five-year period in order to minimize disruption.

COMMON OWNERSHIP NOT INVOLVING NEWSPAPERS[5]

24. *The Arguments.* Most of what little discussion there was on the subject of common ownership of

[5] A few parties mentioned radio-television as well as AM-FM combinations and their comments are included in this section.

broadcast stations in the same market was opposed to prohibitions on AM-FM combinations or divesting any existing radio-television combinations.

25. Because of the Commission's decision to focus on the subject of newspaper-television combinations at the oral argument, most of the parties gave little attention in their recent filings to the other matters which had been included for consideration in the proceeding. A number did mention their agreement with the Commission's decision to give principal attention to the subject of newspaper-television combinations. Many thought that, in addition to not posing problems from a diversification point of view, existing radio-television combinations or AM-FM combinations served an important function. Particularly emphasized was the need of an FM station to rely on an existing AM station in order to underwrite the losses which were sustained while the companion FM station was being established. A similar point was made regarding the cash flow radio stations generate which could be relied upon by a fledgling UHF television station. From a philosophical point of view, too, there was support for permitting such combinations. The main thrust in that regard was that there was no basis for believing that coownership of radio and television stations in a locality was detrimental to the public interest. In effect, these parties took the position that absent a persuasive showing of harm, there was no reason for the Commission to act to terminate such common ownership. Overall the networks pointed to the importance [1053] of the owned and operated stations to the network operations. ABC and CBS stressed the importance of permitting existing radio ownership to continue, particularly in terms of the negative impact

on network radio operations that a splitting of common ownership would have. NBC asserted that existing radio-television combinations should be transferable jointly.

26. A notably different point of view was expressed in the joint filing on behalf of the Civil Liberties Union of Alabama and The Selma Project. Quoting the Commission to the effect that a public interest basis need be shown in order to overcome the importance of diversification which would otherwise call for separate ownership, this pleading urges the separation of AM and FM station ownership. They see no basis for giving different treatment to ownership of an AM and FM station in a locality from that given ownership of two AM or two FM stations there. While acknowledging the advantage that increased non-duplication (as proposed by the Commission) would have in terms of ending waste of spectrum space, they nevertheless insist that two, separately programmed, stations under common ownership do not advance the cause of diversity. In their view, diversity is most important in the smallest of communities where the nonduplication rule may not even be applied, for it is there that choices are usually most limited. Nor do they find persuasive the argument that there would be a resultant diminution in the quality of radio programs if ownership of AM and FM stations were separated. Not only do they believe that independent FM stations could do just as well, they discount the notion that much current programming has any real merit. Finally, they contend that continuation of AM-FM combinations would effectively preclude minority group ownership.

27. Westinghouse believes that newspaper-television ownerships are a more significant problem than

aural-visual ownerships, and that aural-visual separation would disrupt and downgrade service. Cosmos Broadcasting Corp. agrees with the view that there is no need for divestiture of commonly owned radio and television stations and that TV-newspaper ownerships are the more significant aspect of the diversity problem, because other broadcast services are "substantially less significant" sources of news and public affairs information.

28. Affected parties argue that broadcast stations in Alaska are in a unique economic situation which is caused by the isolation and distance of Alaska from the mainland of the U.S., the limited and sparse population of the State and the need for quality service. In addition, they assert that the operating costs of Alaskan stations are higher because all supplies must be shipped a long distance from the lower 48 states and that living costs in Alaska are also much higher than the average in the U.S., resulting in higher wages and salaries, the single highest expense item in operating a broadcast station. TV Broadcast Financial Data for the year 1973 for the city of Anchorage (the only Alaskan city covered by the reports) show that the figures for the three television stations showed an operating loss of $718,673. Similarly, the FCC data on AM and FM stations indicate that in 1972 Alaska was the only state where the radio stations as a whole reported a loss for the year.

[1054] 29. Not only Alaska but stations in Montana should also be exempt from the proposed divestiture rules we are told. The argument is that Montana is a large, sparsely populated State with a depressed economy which, nevertheless, has to absorb costs of construction and operation which are as high in

Montana communities as those in larger markets. Thus, it is asserted, being able to split the costs between television and radio stations contributes to profitability and stability. Divestiture, it is said, would not necessarily increase diversity, for in one particular market one of three assigned VHF channels is inactive, one of three FM channels is inactive and both assigned UHF channels are inactive.

30. *Conclusions.* The issues presented by joint ownership of radio and television facilities in a given market have already been partially resolved. The present rules adopted in an earlier phase of this proceeding bar the creation of such combinations but they do not require separation of existing ownership except through sale to separate owners when they are in fact sold. We were offered no basis for taking any such action to divest any existing combination, nor do we see any such basis for requiring divestiture in the larger markets. Moreover, we do not believe that we need to follow the policy of separating ownership in smaller markets as we have been urged to do. In reaching our decision in this regard we examined all cases where one party owned the only television and the only radio stations in a community. In all instances[6] save one, there was at least one city-grade signal from outside that encompassed the city. Separately owned daily newspapers also served some of the communities. As with the newspaper aspect of this proceeding, we considered this sufficient to demonstrate the presence of a full-fledged competitor and hence that no

[6]In our view the situation in Alaska is unique and we agree with the arguments expressed earlier on the need to exempt stations there. Also, the list of monopolies excludes satellite stations as they are not full-fledged stations themselves and are vulnerable to challenge by a party wishing to operate independently. The very fact they are not now independent suggests that the locality cannot support competing services.

divestiture was required. As to the remaining case, Zanesville, Ohio, where there is no encompassment, the licensee has sold its daily newspaper and it too faces a full-fledged competitor. Accordingly, we shall not make any change in the standards applicable to this aspect of multiple ownership.

31. While it was not the principal focus of the current section of this proceeding, the subject of AM-FM combination ownership is properly before us and in need of resolution. Three major avenues are open. We could act to bar only future combinations, could seek to end existing combinations as well or could act instead through a non-ownership method. There can be no question that wholesale disruption would attend any effort at divestiture. Even if it could be demonstrated (and this record in no way does so) that this would not be an insuperable obstacle, other impediments remain. The state of FM has indeed improved over the years, but much has been due to the pioneering efforts of AM licensees who were encouraged by us to enter the FM market More than this, it is by no means clear that FM stations can yet be expected to stand on their own.[7] Some of course do but many cannot. [1055] Unlike the program duplication question addressed later, separation of ownership ends all economies of scale.[8] Whether prospective or retrospective, we do not believe that a separation of

[7]In the non-duplication notice of proposed rule making (mentioned at the end of footnote 2) we reported on our observations regarding recent developments in the economic position of FM stations. In essence, the data support the idea of separation of programming but fall short of demonstrating that all FM stations can stand on their own.

[8]E.g., use of common studio, same staff, side mounting of FM antenna on AM tower.

ownership is consonant with the current state of the medium. Divestiture could silence a number of stations or leave them too financially weak to offer full service. Even prospective rules could slow growth in FM broadcasting. This is not to say that the idea of diversification is of no importance, but it does not depend on such a barrier to all combinations. Rather, if a license for an unused FM channel is worth seeking, others besides AM licensees will step forward, and under our 1965 Policy Statement on comparative hearings, diversification is the most important single issue governing the choice of who is to succeed in a hearing. Thus, the new, non-multiple owner, entrant has a real advantage. On the other hand, where none steps forward, there is a real reason to doubt that the situation would be different if a prospective barrier existed. Thus, the major effect of any such rule would be to stunt growth where it is most needed and only an AM licensee is ready to proceed or to do the really unnecessary where others already have an interest and a distinct advantage in a hearing. With this in mind, we put the issue to rest and shall not adopt rules in this area.[9]

32. What then of the "single aural service" concept? Does the above discussion portend a change in the Commission's view? The answer is no. The fact that we are not proceeding now to divorce AM and FM ownership does not indicate that other appropriate steps to further our policy goals are not warranted. Just as we have taken the presence or absence of FM station

[9] Since such a conclusion must as always rest on the facts then obtaining, it does not necessarily follow that there never would be a time when separation is necessary. If such a time occurs, we can act; it is clearly not now.

coverage into account in the new AM allocation rules [10] so can we proceed in furtherance of the policy in the area of program non-duplication. We have expressed the view that simultaneous presentation of identical programs on two stations in a community is wasteful of scarce spectrum space. Even if separation is not feasible, extension of non-duplication restrictions may well be. Clearly, if this is done, more program choices will be available to the listener. While no decisions have yet been made on how to resolve the issues raised in the non-duplication proceeding, it is clear that such action as is appropriate in the area of AM-FM combinations should come through such means. Therefore, we shall not adopt rules to bar future AM-FM combinations when the result would be to affect, in many instances, the places where separate FM operation is least likely. Unless there were wholesale divestiture of existing AM-FM combinations, a future prohibition would only require separate ownership of the channels least likely to be viable under separate operation. Only extensive divestiture would provide for separate ownership of just those channels most likely to be worthwhile separately. Even if this makes sense theoretically, the cost would be too high, the cure worse than the disease.

[1056] NEWSPAPER OWNERSHIP— ECONOMIC CONSEQUENCES

33. Much of the discussion relating to daily newspaper-television station commen ownership in the pleadings was approached from the point of view of anti-trust considerations. To aid in understanding the nature of the questions thus presented the succeeding paragraphs in part follow an anti-trust oriented arrangement. In addition, a number of pleadings were

[10] 39 F.C.C. 2d 645 (1973).

directed to the question of diversity of viewpoints as it related to newspaper-broadcasting common ownership. These arguments will be discussed separately.

34. *Relevant Product Market.* When the possibility of garnering too large a share of the market suggests that an anti-trust issue may be raised, there are two initial aspects to consider. The first is the product line or the line of commerce in an economic sense. Sometimes there are difficulties in establishing what is the market because of the dispute which exists regarding the substitutability of products. To give an example: if a steel company seeks to acquire an aluminum company, does this constitute a form of horizontal integration leading perhaps to impermissible oligopolistic concentration? To answer the question requires among other things a determination of the relevant product market, and, in this example, a knowledge about the conditions under which aluminum or steel could be used as substitutes for one another, either generally or in some particular uses. Establishing the relevant product market or line of commerce is one of the most intricate areas of anti-trust law to apply.

35. The dispute here centers on whether newspapers and television stations are part of the same product market, or in other words are competitors.[11] In anti-trust terms this is a basic question, for if they are not, then the cross ownership which exists does not suggest that owning both would lead to owning a larger share of the same market. According to the Department of Justice, newspapers and television stations are in many ways engaged in the same business, namely attracting audiences and selling them to advertisers.

[11] A similar comparison is made between newspapers and radio stations.

While it does acknowledge that the two are not interchangeable for all advertisers, it asserts that the two are far more alike than they are different. It also contends that there is a public interest in preserving competition between products which are physically distinct but are commercially substitutable for certain classes of customers. Since Justice sees newspaper and television advertising as interchangeable, it would define the product market so as to include newspapers and television stations.

36. A number of other parties have expressed a contrary view on the subject. It is their reading of pertinent cases that newspapers and television stations constitute separate lines of commerce. The principal distinction mentioned by these parties seems to be based on differences in the kind of advertising carried by each—the newspaper being mostly a vehicle for local advertising with television stations carrying mostly national (or at least regional) advertising. They also mention a distinction usage, with television being capable of conveying motion, activity and emotional ambience and newspapers being needed for the presentation of extensive factual information that television [1057] can present only in fragmentary pieces or for uses that do not extend beyond a simple brief exposure.

37. *Relevant Geographic Market.* To evaluate the economic implications of the situation requires knowledge not only of the product line but of the geographic confines involved as well. Depending on where the geographical line is drawn, the situation could be much altered. Generally speaking, as the area enlarges, the part of the market belonging to the company in question drops as other economic entities are included

in the market share calculations. The subject is not the simple one it may seem, as there are a number of ways to go about the determination. Thus, as parties have pointed out, even the Commission has approached the subject differently at different times. In the *Frontier* case,[12] the Commission dealt with the question through the use of the city and environs as the relevant geographic market rather than the much larger Grade B coverage area of the television station in question. Later, when considering the *Chronicle* case,[13] the Commission used the station's Grade B contour.

38. As might be expected, the parties favoring divestiture urge a narrower geographic confine for use in a Commission determination, and those opposing divestiture urge a broader one employing Grade B coverage or ADI for the television station and for newspapers the similarly extensive primary market area or the city and retail trade zone. In the Department of Justice filings against the renewal applications for several stations, the thrust of its pleading here has been followed, with use of a market in no case larger than the equivalent of a city and its suburbs.[14] Conversely, the opposing parties urge the Commission to apply its own standards and to reject as artificially contrived the market concepts of the Department of Justice.

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[12] 21 F.C.C. 2d 570 (1970); 23 F.C.C. 2d 316(1970); 27 F.C.C. 2d 486 (1971); 29 F.C.C. 2d 480 (1970); 35 F.C.C. 2d 875 (1972).

[13] 16 F.C.C. 2d 882 (1969); 20 F.C.C. 2d 903 (1969); 40 F.C.C. 2d 775 (1973).

[14] Separately from the anti-trust based market concepts is the alternative suggestion from Justic to divest wherever the Grade B television signal encompasses a SMSA of the newspaper community.

39. *Market Share of Newspaper-Television Station Combinations.* Certain facts mentioned by the parties are not in dispute. Daily newspapers tend to be much larger enterprises than television stations. Radio stations are significantly smaller than either. Moreover, few cities have competing daily newspapers, so that from the point of view of advertising revenues, a daily newspaper-television station combination would inevitably garner a sizeable portion of the total local advertising revenues. The dispute, then, centers on the importance of these economic facts in terms of Commission policy goals. Also, to what extent should the Commission take into account the multiplicity of media exposure from magazines and other sources, in determining the degree of concentration? The Department of Justice points to a Roper study that indicated that the public principally relied on newspapers and television stations for their news. On this basis they would give little weight to other media sources. Justice then goes on to compare to the local market shares of the newspaper and television station combinations with Clayton Act Section 7 merger guidelines. Simply put, in an oligopolistic situation the acquisition of even small [1058] shares of the market can conflict with these guidelines. However, as a number of parties point out, the prohibition in Section 7 applies to acquisitions, not to internal growth, as was the case with the creation of most newspaper-television combinations. Instead, these parties point out that the Sherman Act prohibitions on monopolization apply. In such instances, Section 2 of the Act requires a showing of action of the entity in question to set prices or otherwise restrict competition. They contend that no showing has been made that establishes anything

resembling such economic power. According to these parties, even the Rosse, Owen, Grey study[15] purporting to show higher rates being charged by newspaper-owned television stations, to which the Department of Justice refers, is subject to many doubts, so that even the Department does not vouch for its methodology or conclusions. The conclusion that a 15% price increase differential is available to newspaper-owned TV stations is directly refuted in two industry studies which point out that the other study did not take audience figures into account in relation to prices charged. Our own examination does not substantiate the findings of the Rosse study.

40. It is clear that by any standard, market differences do exist, and that the extent of economic power, whether exercised or not, varies. When this proceeding began, there were 19 instances (now fewer) in which the owner of the only local daily newspaper also was connected to the only television station licensed to the community. From a concentration point of view, these would seem to present the most severe cases, but even in these instances, the industry did not agree that action by this agency was appropriate. They say also that from a diversity point of view even in these communities there is a plethora of media voices originating in or entering the market. While the overall industry view is that there is no need for any divestiture, at least one broadcast filing (that of the Post Company, of Idaho Falls, Idaho) seems to indicate that presumptively in these cases of one-owner markets there is a condition of inadequate diversity. The Post Company prefers a rule to an *ad hoc* approach or if

[15] *Empirical Results on the Price Effects of Joint Ownership in the Mass Media* (1970). See para. 96, *infra* and Appendix B, p. 1.

that fails to be adopted, a policy statement. Either, it argues, would be preferable in terms of industry stability because it would give advance notice, simplify administration and reduce uncertainty.

41. *Audience Share of the Market.* The National Citizens Committee for Broadcasting ("NCCB") would follow the approach of the de Jonckheere study[16] on market share and give appropriate market share weights on a scale of 100, divided 40 to daily newspaper, 40 to television stations, and 20 to radio stations. Each entity would be given its circulation share (or be evenly divided for radio stations) and the market share thus be derived. Although NCCB would not include weekly newspapers, it says if they are to be included, they should be given 1/7 the weight of a daily newspaper. To the figures on market share thus obtained NCCB would apply both *per se* and *prima facie* limits. If a single owner had a 30% share it would be considered *per se* objectionable; 20% to 30% would constitute a *prima* [1059] *facie* showing of concentration that a party could offer to rebut. NCCB would have the Commission ignore a less than 20% market share absent an allegation of abuse. According to NCCB, its plan avoids the pitfalls of a mandatory across-the-board ban which by its nature could not take into account differences in individual markets. Likewise, it sees this approach as being preferable to the haphazard methods involved in a totally *ad hoc* procedure.

42. *The Place of Anti-Trust Considerations in Commission Determinations.* No one has argued that anti-trust considerations are totally inapplicable to the

[16] *Monopoly in the Media*, by Terrall M. de Jonckheere. See Appendix B, p. 2.

media, rather the dispute centers on the importance of anti-trust considerations to the resolution of the public interest issues now before the Commission. The Department of Justice points to its own responsibility for the enforcement of the anti-trust laws and for the preservation and enhancement of commercial competition as the basis for its filing here. Its view is that the Commission should act itself based on the anti-trust arguments which have been made. In particular, Justice says that there is too much concentration of ownership which in turn has caused a curtailment of the options open to advertisers. Throughout, the Justice filings proceed from economic premises having principally to do with economic competition for advertising. It is not that diversity of viewpoint is not dealt with; it is. Rather, it is a question of the orientation, of views expressed in competitive terms, views it feels the Commission is obliged to consider.

NEWSPAPER OWNERSHIP–DIVERSITY OF PROGRAM AND SERVICE VIEWPOINTS

43. The preceding discussion has focused on the economic significance of combinations. The other side is the impact on the dissemination of ideas in a democratic society if there is a combination of media holdings held by a single entity. At what point, if any, is there a lack of diversity of viewpoints and programming or if such diversity at some level exists does that end the need to consider the size or market share of the entity in question? These are the kinds of questions to consider.

44. Opponents of the proposal have argued that the proposal rests on the false premises that current diversity is inadequate and that 51 voices are necessarily

better than 50. However, they assert, if the forced transfer of a station to the 51st voice results in the station's news operation's being reduced to "rip and read", the addition of the 51st voice would not have been beneficial.

45. *Do They Speak With One Voice.* Opponents contend that cross ownership of newspapers and broadcast stations does not mean that both entities speak with the same voice. Most of the parties state that their broadcast stations and newspapers have separate management, facilities, and staff, including news and advertising staffs (which compete with each other for advertising), and do not have joint advertising rates. Some even claim that because they have separate editorial boards they present editorials in one outlet which are opposed in the other. We are told that there are other built-in protections against commonly owned newspapers and station's offering the same viewpoint [1060] and information. These parties point to the professionalism in journalism and the development of industry practices and codes of ethics which transcends employee-employer loyalties and result in highly independent staffs operating even common owned media. Also, the technology which requires specialized and separate management teams for various media holdings is said to limit the influence of the common owner. Finally, we are assured, there is protection because of existing diversity, so that in major markets it would not be possible to control the informational output of the communications media or to prevent a significant point of view from reaching the public. These parties assert that if abuses of this nature were occurring, there would be outcries from the public and other local competitive media. They believe that the

absence of such complaints is the most telling argument against the need for the proposed rules and that in smaller markets economic considerations may inhibit the financial separation of different media.

46. Supporters, on the other hand, argue that a so-called separation cannot be considered as equivalent to separate ownership. They fear conscious or unconscious decision making protective of the other entity and even more the possible inhibition in the operation of each without regard to the consequences on the other. They urge separate ownership as the only way to have truly diverse and antagonistic voices.

47. *Adequacy of Current Diversity.* Opponents point out that there has been a long term trend of increasing diversity of media ownership with many more broadcast stations operating now than formerly was the case. According to NAB, in the top 100 markets (based on size of SMSA's) the total number of media outlets has increased markedly. From 1922 to 1967 the number of broadcast outlets increased 968%. While the number of daily newspapers has remained about constant, they say that there has been considerable growth in circulation, particularly in smaller cities. This leads these parties to conclude that in most major markets the addition of one more media owner would have a minimal effect on the amount of diversity in that market as there will continue to be a large number of media owners even if the proposed rules are not adopted.

48. More specifically, many parties referred to the Seiden study submitted by NAB to show that there is ample diversity in their own markets. The Seiden study listed all media available in each market in various categories, including those originating within and outside the market. Unlike the premises under which

this study was done, the Justice Department would only include local television and newspapers in evaluating diversity since in its view these are the only effective competitors for local advertising. Weekly newspapers and other periodicals as well as broadcast signals originating outside the market on this basis should therefore not be counted. Opponents of the proposed rule and of the Justice viewpoint recommend that national media be considered in addition to local media because they reach substantial numbers of people to provide diverse information sources. Further, they urge that the fact that the public favored one medium or one newspaper or broadcast outlet rather than another should not be taken as indicating a lessening of the diversity of available media. [1061] They thought it should be irrelevant for the purpose of the Commission's proposal that the circulation bases differed so markedly.

49. At the time the proceeding began there were ninety-four (94) TV stations which were affiliated with local newspapers. The Seiden study purported to show that there is abundant diversity in these communities as well as elsewhere—that there is abundant diversity in every TV market. In New York City, we were told, there were 610 media with 434 owners. Even in Zanesville, Ohio, the then most concentrated market, there were 49 media with 39 owners. Of these, four media were considered local, and were held by two owners. In Glendive, Montana, the smallest market, there were 36 media with 30 owners. Of these, five media with four owners were local. The average for the top 50 markets was 317 media, owned by 170 different groups. Of these, 139 originated in the market and were held by 111 different owners.

50. The American Newspaper Publishers Association ("ANPA") says that the number of newspaper-owned TV stations had decreased since 1948 when 48% were owned by newspapers to 14% in 1969, and there has been an absolute as well as proportional decrease in newspaper-owned stations since 1955. The NAB says that newspaper ownership of all broadcast outlets is less than 7%. The Udell study submitted by the ANPA showed that in 78 markets with newspaper owned TV stations, 143 TV stations commenced operation after the newspaper owned station, and 131 of these new operations were started by non-newspaper interests. This to them shows that newspaper owned TV stations have not discouraged others from entering the field. Udell found that although often the newspaper-owned TV station dominated its market there were many cases in which it was not the dominant station.

51. Opponents assure us that the Fairness Doctrine, Section 315 of the Communications Act, and the developing body of law falling under the category of "access to media" ensure that stations will not present only one viewpoint. Moreover, we should take into account, they insist the fact that the public's increased awareness of its stake in the free flow of information has caused an increase in the filing of petitions to protect that interest and this too helps to ensure diversity of viewpoints They conclude that not only do we have enough diversity, in fact modern technology has brought society to the point of information overkill, where the individual is paralyzed by the sheer volume of information and available choices.

52. Supporters of Commission action do not accept any such view. Instead they see a growing diminution in major media choices particularly newspapers and they

assert that the Seiden approach uses numbers to obscure the situation by the faulty means of equating media regardless of subject or circulation.

NEWSPAPER OWNERSHIP—SPECIFIC ARGUMENTS

53. *The Commission Should Proceed on an Ad Hoc Basis Rather Than By Rule Making.* The parties who oppose adoption of the rules contend that as to newspaper ownership the Commission should con- [1062] tinue to use the *ad hoc* approach as it has in the past rather than proceed on a rule making basis. The Commission, it is said, has greater flexibility in attacking situations where specific abuse may occur by the *ad hoc* approach rather than by seeking an across-the-board solution by means of a rule. They insist that both the Commission and the Department of Justice have the tools and the authority to reach any situations with the potential for abuse so that wholesale divestiture without regard to the facts of each particular situation is simply not warranted. Each market, they say, has its own characteristics and each differs from every other market; a rule would not take these differences into account nor would it make provision for those individual situations where there is no question that the cross ownership has resulted in superior service. Opponents further argue that the proposed rules reflect only one component of the public interest, i.e., diversity, and ignore other important elements such as the costs and detrimental effects of forced separation.

54. The rule making approach, opponents charge, represents a blunderbuss policy in place of precise and carefully fashioned judgments based on facts in each

individual situation. They assert that if the Commission were to continue to attack the problem on a case-by-case basis, it could root out those situations which threaten injury to the public interest without itself inflicting injury on the public interest by requiring the divestiture of a cross owned station where there has not been so much as a suggestion of impropriety. The Commission should, it is asserted, consider, in each individual situation, such factors as the extent of interdependence of the cross-owned media in a particular market; whether the market is metropolitan, regional or local; the prospects for financial independence; and the extent of the possible disruption of service to the community. Factors such as these, they say, do not lend themselves to consolidation in a rule. Finally, the opponents argue that, in order to warrant an industry-wide approach such as that represented by a rule making proceeding, the Commission must, at the very least, indicate that the problem which it seeks to attack is so widespread as to require such an approach. This they charge the Commission has not done.

55. Supporters urge us to act through rule making rather than *ad hoc* procedures as in keeping with our stated intentions in this regard and with other approaches taken in the area of concentration. Moreover, we are told, such an *ad hoc* procedure could introduce uncertainty to the detriment of the industry and public alike.

56. *Divestiture Would Not Necessarily Accomplish the Desired Ends, and Might Produce Harmful Results.* Opponents have asserted that if any divestiture were to be accomplished through the trading of broadcast properties between newspaper publishers there would

be no overall decrease in concentration of control nor any increase in the total number of available voices. Thus, they insist, no real benefit would be brought about by divestiture, but real detriment would. An economic study offers the view that it is easier to operate a broadcast station within your home market, so that a station outside the home market would bring a lesser price. Further, a publisher accustomed to operating a station at home might be unwilling to undertake a similar opera-[1063]tion in some other city, with the attendant increases in costs and additional control and managerial problems.

57. The economic studies further contend that by the very fact that many stations would be put on the market, the value of those stations would be reduced. However, in spite of this reduction of the price of stations it is asserted that in many instances the price will remain too high to service the debt capital necessary to purchase a station. Under these circumstances, they expect that many of the available stations would be purchased by multiple owners or nationwide conglomerates, with the result that the divestiture requirement would not increase the overall diversity of voices, and it may in fact decrease the number of available voices. Supporters point out that as to the community in question, they nonetheless would represent a new choice.

58. Some parties assert that there is a correlation between newspaper ownership and high quality news and public affairs programming. Others contend that economies of scale can be achieved with corporative news gathering facilities. In both instances we are told, divestiture would result in a loss of these benefits, perhaps causing a reduction in the quality of program

offerings because owners could no longer rely on these resources. However, on the other side it has been alleged that there is no correspondence between the quality of news carried on a television station and that contained in a commonly owned newspaper. In addition, proponents of the rule contend that there has been no showing that economies of scale exist or if they do exist, they charge that they are products of an oligopolistic situation which has resulted in higher advertising prices on jointly owned facilities. Post-Newsweek asserts in its study that it is not common ownership but other factors[17] which account for higher advertising rates, and various parties point out the study showing higher television rates failed to take size of audience into account.

59. *The Proposed Rule Assumes a Similarity in Cross-Ownership Situations.* According to various opponents the approach we contemplate fails to recognize the differences between UHF and VHF, between radio and television, and between markets of different sizes, subordinates the public interest to administrative convenience and will have lasting deleterious effects on the industry. Thus they say we should observe these distinctions and recognize that a rule requiring divestiture for radio-newspaper combinations is not necessary because in most large markets an individual radio station does not have significant market power. However, it is said, in smaller markets (below the top 100) individual radio stations may be significant competitive factors Therefore, we are urged to review

[17] The four are: being the first station on air in market, being a CBS affiliate, operating on a low-band VHF channel or lowest channel in market, and having the highest audience share.

radio-newspaper combinations in markets below the top 100 on a case-by-case basis and require divestiture where necessary. Others urge the adoption of specific rules for smaller markets.

60. Licensees in smaller markets generally believe the Commission's concern should be with larger markets and exemptions should be provided for smaller markets. They point to the smaller size of these [1064] combinations, arguing that as a result there is less cause for concern about detrimental impact and more about disruption. However, licensees in large markets believe the serious problem exists only in those markets where there is only one daily newspaper and only one television station. These parties place their stress on the number of direct competitors in the market.

61. *Unique Situations.* Several parties argue that "unique" situations in particular markets require that the proposed rules not be applied in those cases. For example, the licensee of a Class A FM station in Santa Monica, California, and publisher of an evening newspaper in Santa Monica argues that his holdings constitute a minute fraction of the total mass media in the market. Santa Monica, a suburb of Los Angeles, is said to be saturated with broadcast service, receiving primary signals from 10 AM, numerous FM and 11 commercial and one educational television stations. Similar arguments have been made that other communities are overshadowed by nearby cities of much greater size, and we have been told that in such communities, UHF and FM stations might not have survived without newspaper ownership.

62. *Jointly Owned Broadcast Stations and Newspapers in the Same Market Can Give Better Service.* One frequent argument is that joint ownership of

newspapers and broadcast stations made possible the early development of FM and TV service even though these pioneering stations often had to be operated at a loss. This leads these opponents to conclude that had the resources of newspapers not been available, the public would have been without such service for a long period of time.

63. In addition to the historical argument, these parties offer arguments supporting the view that benefits would continue to accrue. According to the exponents of this view the public would lose more than it would gain if those of the journalistic tradition are excluded from broadcasting. They argue that newspaper owners, coming from a tradition of journalism rather than entertainment, have set high standards of emphasis upon informative broadcasting with extensive news staffs and upon dedication to meeting community needs and advancing community projects. In fact, former Chairman Newton N. Minow has suggested that the public interest might better be served if, contrary to the thrust of our proposal, more newspapers were given the opportunity to operate TV outlets in their communities. He also suggested that the tradition of professional journalism offered by the newspapers greatly enhanced their ability to offer programs in the public interest.

64. The argument has been made that integrating broadcast and newspaper operations enables the licensee to provide service in the public interest which could not be provided if the operations were conducted independently and under separate ownership. Combined ownership is said to permit experimentation, innovation, minority programming, more effective dissemination of news and public information, independence from advertisers, lower advertising costs, financial

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stability, and otherwise contributes to diversity. They argue that because of the combination, many efficiencies and economies of operation can be effectuated, such as economies in buying and maintaining equip-
[1065] ment, the joint use of buildings and office space, the common staff of program, technical and administrative personnel, etc.

65. Many have asserted that newspaper-owned broadcast licensees have a record of public service which is among the highest in broadcasting. Their contributions to the public interest constitutes in the view of these parties a tangible benefit which cannot be sacrificed for the theoretical benefits which the Commission has assumed will result from the proposed divestiture. They assert that newspapers owning broadcast stations in the same community are doubly conscious of their responsibilities to the public and have a greater knowledge of and immersion in the community's needs and problems than do non-newspaper owners. Local newspapers are said to often be locally owned by people who have long been directly involved in the community and in community service, particularly as an outlet for public expression. They insist that newspaper ownership of broadcast stations is more stable than that of other entities and that newspaper owners do not traffic. Continuity of ownership of broadcast stations we are assured would avoid the weaknesses inherent in stations which change hands frequently. We are told that the long term owner is continuously aware of community problems and by so doing can maintain a long range effort to deal with those problems.

66. Conversely, the argument is made that the existing owner takes the community for granted, and assumes too much in connection with ascertaining

community problems. A newcomer, the view goes, would gain fresh insights since it would have to ascertain without presumption based on past history. Thus, the argument goes, service could actually improve.

67. In connection with radio stations in particular, opponents of the proposal see real benefits in newspaper ownership. They say that there are many situations where a radio station could only survive economically because of the support provided by a co-owned newspaper in the same market. If this were precluded, they feel the community would have fewer voices. They also assert that such a combination could provide higher quality programming than could normally be expected from singly owned stations. Moreover, the programming of newspaper owned stations is said to function as a counter-balance to national network dominance.

68. *Broadcast Media and Newspapers Are Not Comparable.* Although opponents of the current proposal acknowledge that newspapers and TV are the public's primary source of news, they contend that there is a radical difference between them, both in method and scope. They are seen as complementary, not competing, sources of news. In their view the Commission's statement that newspaper ownership of a co-located TV station directly parallels joint ownership of two TV stations in the same community, ignores many salient differences. For example: (a) the broadcast media bring the public only the headlines whereas newspapers provide the details and background; (b) the broadcast media devote no more than 10% to 12% of their time to news whereas newspapers devote 100% of their non-advertising space to journalistic function; (c) broadcasting is basically an entertainment medium whereas a newspaper is primarily a [1066] news

medium; (d) a newspaper is a recorder of events whereas the broadcast media are not; (e) newspapers provide a permanent record for future reference whereas the broadcast media do not; (f) the types of advertising and the products advertised through the two media differ; (g) the two media do not necessarily encompass the same market; (h) the persons who use TV as their primary source of communication do not necessarily subscribe to newspapers; and (i) the broadcast media are inherently incapable of providing on a day-to-day basis in-depth local reporting whereas a newspaper has such capability. Pointing to the Commission's *Further Notice* in this proceeding (at para. 29), where it was indicated that studies showed that persons relying most heavily upon newspapers as a source of information are those identified as leaders or opinion molders, the opponents state that the joint ownership of a newspaper or TV station is likely to make no difference to these people since the nature of the newspaper analysis of a news event varies so greatly from the most abbreviated form of news which appears on TV. Further, we are assured, these persons are unlikely to rely on a single source of information for their news.

69. The point is also made that the two media function quite differently in the manner in which they cover the news, thus reflecting not only the innate differences between the media but differences in coverage as well. These factors are said to ensure that the public receives the benefits of separate news sources, which do, in fact, even if they are commonly owned, offer divergent viewpoints and approaches to issues of public concern. Editorial practice we are told, is a far more significant facet of diversity than is

ownership. Accordingly, they would reject what they see as the Commission's assumption that cross-ownership causes newspapers to speak and write with one voice. Not all parties, of course, find these distinctions particularly important as they continue to see the two as parallel entities.

70. *The Rules Would be Contrary to Past Policies and Pronouncements That Led to the Development of the Present Broadcast Services and are Inequitable to Those Who Acted in Reliance on Those Policies.* The various parties presenting this argument submit that the present structure of the broadcast industry has been created by the Commission which has licensed each station in question, at times after a comparative hearing, and repeatedly renewed those licenses after finding that the renewal would be in the public interest, convenience and necessity. These parties contend that it would be a breach of faith for the Commission to now reverse these prior decisions and ban the cross ownership which was previously approved.[18]

71. They assert that diversity is one of several fundamental criteria considered by the Commission in granting broadcast licenses, and the Commission has considered these other criteria, including local ownership, integration of ownership and management and experience, in finding that a grant of a broadcast license to a newspaper or existing broadcast licensee would serve the public interest. Instances of such [1067] actions they point to include the licensing of the AM

[18] In part, this is in response to the Commission's statement in the *First Report and Order* (in particular in para. 22) that changed circumstances necessitated that a different view now be taken regarding such combinations.

and FM stations in Elyria, Ohio, to Elyria-Lorain Broadcasting Co., the publisher of the local newspaper; the assignment of KOA-AM-FM and TV, Denver, Colorado, to a single party; and the grant of the application of Paducah Newspapers, Inc. for WPSD-TV in Paducah, Kentucky. They also mention *Orlando Daily Newspaper, Inc.*, 11 F.C.C. 760 (1946) and the *Policy Statement on Newspaper Ownership*, 9 R.R. 702 (1944). Based on their reading of these precedents the current proposal would without valid basis, they aver, summarily reverse the ongoing practice of years standing.

72. On the other hand, supporters of Commission action assert that while the economic and technical considerations of the 1940's and 1950's justified a more lenient Commission policy toward cross ownership, those prior considerations are no longer operative. Under present conditions, they think it is unlikely that the number of newspapers and broadcast stations will significantly increase in the foreseeable future, and the Commission is therefore justified in taking a more restrictive approach (see footnote 18).

73. *Great and Irreversible Damage Would Result To Media and To Individual Stations and Newspapers.* Opponents insist that no matter how economically strong, no industry can absorb unlimited burdens. At some point they say, there is a limit, which once exceeded, leads to a collapse of that industry. They assert that quite a number of burdens have been imposed on broadcasters so that the point is nearing when the ability of the industry to respond may be impaired. As examples of such burdens they mention a series of recent Commission actions such as increased fees, new renewal procedures and prime-time access as

well as the more frequent occurrence of petitions to deny any increased costs. The point is that whatever the source, whatever the legitimacy of the justification, the unavoidable impact on the broadcaster is a burden that can lead to a driving out of needed capital as well as a pushing away of fresh talent and creativity. Opponents argue that too much of a good thing can be fatal and that the price paid would be in lessened diversity, which is the opposite of the hoped-for result. Supporters assert that we should question these dire predictions. These, for the most part, are seen as greatly exaggerated. Such validity as is accepted is said to exist in only some individual circumstances.

74. The proposed rules would also have adverse economic consequences for newspapers we are advised by opponents. Divestiture could impair the revenues of newspapers and result in the decline in their value. Moreover, they contend that to the extent owners decide to keep their broadcast stations and divest their newspapers, there would be a decline in the value of newspapers with potential for forcing marginal operations out of business. They also suggest that the proposed rules would threaten the balance reached by the Congress in the Newspaper Preservation Act between the public interest in competition and the public interest in continued financial viability of newspapers and their editorial independence. Finally, they express a concern that adopting rules might limit the ability of publishers to enter into electronic newspaper distribution in the future. They feel that for newspapers to remain viable it may be necessary for them to be able to [1068] use something other than the present modes of newspaper production and distribution which may become too slow or expensive.

75. Divestiture, opponents assert, also raises questions concerning the continued viability of special format daily newspapers. For example, the licensee of an AM and FM station in New York City also publishes a daily Yiddish-language newspaper. The paper operates with an annual deficit which in part is offset by an annual profit from the radio stations. The licensee contends that funds from the radio stations are necessary to provide for continued publication of the paper.

76. Finally, a particular danger is said to be involved in divestiture because the results would be permanent and irreversible. They assert that the genius of the administrative process is its ability to be flexible and to consider matters in the light of changed circumstances, attributes which would not be brought to bear for there is no way to return to the *status quo ante* if the results are not what were intended. They argue that since there is no way to return the outlets to their original holders if the action proves improvident, the risk is so great that any cause for concern is sufficient to establish that the step should not be taken unles there is clear proof of harm from the existing circumstances.

The Rules Would Discourage Risk Capital in Broadcasting and Impose High Costs of Operation Contrary to the Public Interest

77. This argument, made by several broadcast interests, is that divestiture would result in a drastic alteration of the industry structure and breed economic instability. This they say would come about because the new owners of divested stations would face significant economic burdens, principally as a result of paying high prices for broadcast properties that have appreciated

greatly over the years. Because of high interest rates, the cost of debt service will reduce the working capital and profit accumulation which would otherwise be available for programming including news and public affairs. Beyond these economic factors, various other burdens are mentioned as being placed on broadcasters, and the fear is expressed that this could be a last straw. The continuing infusion of capital, energy, and creativity needed to properly nourish the industry in their view may be stymied because of the economic burdens, the governmental interventions and restrictions imposed. The NAB sees this proceeding as one in which adoption of the rules would give just such a negative signal to those now involved or who would become involved in broadcasting: results clearly detrimental to the public interest. Supporters say they cannot agree that an industry they see as characterized by extraordinarily high profits would somehow become anathema to investors.

The Proposed Rule Amounts to the Virtual Abandonment of the Commission's Policy Favoring Local Ownership

78. Opponents charge that the divestiture provision of the rule would frustrate the Commission's policy favoring local ownership which has long been considered conducive to programming responsive to local needs and interests. This they say can be seen in the Commission prediction that many licenses will simply trade stations with [1069] other licensees, thereby achieving divestiture without significant upheaval in the identity of the media ownership. They argue that this trading of broadcast properties would result in absentee ownership. However they do not think such ownership

is desirable, particularly where a broadcast station is traded away from a newspaper with local ownership and strong community ties. Rather, they believe that the strong affiliation between a newspaper and its community often results in programming on a commonly owned television station which is particularly responsive to the needs and interests of the community. They think an absentee owner, with less contact with the community might be less concerned with the public interest and more concerned with the balance sheet, and the divestiture may result in the fragmentation of professional staffs which have been built up over the years to provide the best possible service to the public. This leads them to conclude that the absentee ownership resulting from divestiture would therefore result in a loss of service to the public.

79. Opponents have rejected suggestions that the first opportunity to purchase a station be given to a local group or that more than one potential purchaser be submitted to the Commission as unworkable and contrary to Section 310(b) of the Communications Act. They assert that such courses of action would interfere with existing interests and equities and jeopardize existing service. Proponents, on the other hand, asserted that any resulting reduction in local ownership should not be used to justify and maintain a monopoly situation, and they urge the Commission to proceed with divestiture. In their view, local ownership as a goal necessarily pales in comparison with providing needed diversity.

Newspaper Ownership—Miscellaneous Arguments

80. Parties opposing the Commission's proposal have offered several procedural or jurisdictional objections.

Several have taken the view that the proposal represents such a fundamental policy shift that the Commission should not act without Congressional mandate. It was their view that this subject should be considered at Congressional hearings from which policy guidelines would emerge. The Commission is urged not to proceed without such guidance from the Congress.

81. Two other procedural objections to implementation of the proposed rules have been interposed, both relying on the view that a hearing would be required beforehand. One asserted that the Commission should not proceed without holding oral argument on the proposal[19] and the other insisted that any affected party would be entitled to a full evidentiary hearing before it could be required to divest.

82. Progressive Broadcasting Corporation is licensee of Stations WHOM-AM and FM and is commonly owned with a daily newspaper. It wonders if the rule would apply to it and asserts that if it would special recognition is required of its unusual situation. It argues that a rule should not apply to it since the radio stations are essentially Spanish language and the daily newspaper, even if it is circulated generally, reaches only an audience that reads Italian. [1070] Moreover, it asserts that the Spanish speaking audience for the stations does not much overlap with the readers of *Il Progresso Italo-Americano.* Aside from the divergence in audience, Progressive contends that neither has the broad general appeal and impact that seemed to be the cause of the Commission's concern. For itself and others similarly situated Progressive asks that any rule

[19] This, of course, has taken place.

which might be adopted not be considered applicable to such situations.

83. The Illini Publishing Company, a not-for-profit corporation at the University of Illinois, owns the daily student newspaper, an FM station, and the yearbook. It stated that it would not comment on the desirability of cross-ownership for commercial properties but that cross-ownership in its situation is a guarantee of financial and therefore editorial independence from the University administration, the student government, or any other potential pressure group. It has never accepted student fees but has depended on the sale of advertising and circulation, and in various years one or the other of the three media was supported by its fellows.

84. The Forward Association publisher of *The Jewish Daily Forward* and licensee of New York City Stations WEVD-AM and FM says it is not clear whether the rule would apply to foreign language newspapers. The Association says it should not, but if it did, the Commission should hold an evidentiary hearing in each case to determine whether divestiture should be required.

85. The Oklahoma Press Association in opposing the proposal notes that some universities have both newspapers and television stations. While educational broadcast stations are exempted from the duopoly rules, it points out that it is not clear where the proposal leaves Notre Dame University and the University of Missouri, both of which operate *commercial* television stations (WNDU-TV and KOMU-TV, respectively).

86. Finally, several parties wonder how many papers per week a newspaper must publish to be defined as a daily? Is a paper that publishes three days a week a weekly and one that publishes four days a week a daily? They also suggest that if the proposed rule is adopted, it could be circumvented by publishing six different weekly publications, each on a separate day.

Divestiture Would Constitute an Unprecedented Governmental Intrusion

87. The NAB and others insist that there is no precedent for the action proposed here. Never before in the history of the FCC or any other governmental agency, they assert, has a proposal of this magnitude ever been implemented. In strictly legal terms, the charge is that no agency has ever so proceeded without basing its action on a proven law violation and in furtherance of an express statutory authorization. Here neither is said to be present and this makes it all too clear how drastic and extreme the proposal really is. The closest example, that of the 1943 FCC action affecting radio duopoly cannot, it is said, be considered analogous. In that situation, we are told, relatively few stations were affected and the economic impact was notably smaller than that which would be anticipated here.

[1071] *Divestiture Would Have a "Chilling" Effect and Inhibit Free Speech and Press*

88. The charge is made by the NAB that already extensive regulation exists and unwarranted extension of such regulation could only have harmful results. Inevitably, they feel, a fear would be created that governmental action could be invoked as a means of

expressing displeasure at a course of conduct, not because it is unlawful but because it is contrary to governmental preference. Even if the current proposal in itself did not bring the weight of government to bear in such a manner, they believe that the fear would be created that it could happen in the future. The net effect they foresee would be a restriction on free speech, a curtailment of creative journalism, affecting newspapers as well as stations. Thus, the NAB states, in a democracy, it is the power of the government, not that of the press that is to be feared. Especially in the current political climate, the action here proposed is bound to be interpreted as a governmental assault on the free press, it is argued.

89. The lesson of history in this regard is said to be clear: there is no such thing as compulsory freedom. Just so, there can be no compulsory diversity. The greatness of this country's press, print and broadcast, we are told is the product of the lack of governmental intrusion. It is its freedom of operation that has and will continue to offer a continuation of the situation in which American diversity exceeds that of any country. The Commission is urged not to yield to temptation by following the restriction paths traveled by other countries. Rather, the Commission should follow the path of freedom and non-intervention. Supporters assert that the structured approach involved here is a lesser danger in free speech terms than Commission intervention in programming as could happen in fairness cases.

If Any Rule Is Adopted, Existing Interests Should Be Grandfathered

90. This view which is in direct conflict with the divestiture proposal was expressed by Duhamel Broad-

casting Enterprises, Inc., and Paducah Newspapers, Inc. Divestiture, Paducah says, would be disruptive, counter-productive, unfair, oppressive, etc., and should not be ordered in the absence of a showing of specific harm. Although cast somewhat differently, the point is essentially the same as that presented by many other parties and which has been discussed previously.

Proposal Too Rigid

91. Several points are subsumed under this heading. One concerns the view expressed by several parties that an exemption for UHF stations is an economic necessity. At most, they argue, these situations should be considered on a case-by-case basis. Another party takes the view that in certain markets, a weekly newspaper can be the more powerful medium, not the daily, and the rule would give no recognition to such a situation.

The Commission Should Adopt Specific Rules To Deal With Potential Abuses

92. Several parties suggest that if the Commission can identify evils which could occur in cross-ownership situation, such as preferential [1072] advertising rates for purchase of both newspaper space and broadcast commercial time, it should regulate such practices by specific rules. The Commission's response to the payola scandals–sponsorship identification requirements of Section 73.119 and 73.654–is said to be a good example of selective rule making.

93. According to various parties, the objective of achieving maximum diversification of media ownership is not in and of itself determinative of where the public interest lies. This is said to be evidenced by the

numerous cases in which the Commission has granted, in comparative proceedings, applications resulting in a greater concentration of media control. They take the view that the Commission's proposal would establish an irrebuttable presumption that any legally qualified applicant unconnected with a newspaper will serve the public better than a station owned by a company which also publishes a local newspaper. A complete prohibition of common ownership is said to risk the exclusion of the best available interested part to the community which in some cases might lead to the exclusion of the only applicant. In sum, the view is that the single most critical factor in governing the extent to which the public interest will be served is the licensee's motivation and interest in serving the community. According to many affected parties the common owner of co-located newspaper and broadcast facilities is often the only one in the community so motivated. On this basis, they assert that the proposed rules would work to the detriment of the public, and thus they urge rejection of such a rule. Supporters see things quite differently, questioning whether such a grant could really add anything worth the cost of possibly forever excluding another party which might step forward in the future.

MAJOR STUDIES SUBMITTED

94. A number of studies have been submitted, including some by parties not associated with the newspaper or broadcast industries. The studies cover four major topics. Some studies treat more than one topic, but are listed only once in the summary which follows. A list of these studies is contained in Appendix B.

95. *Economic Consequences of Divestiture.* Both the Frazier, Gross study and the First National City Bank study indicate that combination owners will most likely transfer their TV stations rather than their newspapers. First National is extremely pessimistic about the financial outcome for sellers of TV stations, under divestiture market condition. Frazier's judgment is that TV stations will sell at 10% to 20% below true value if all affected stations were to be divested. Our own evaluation is that the concern may be exaggerated.

96. *Effect of Common Ownership on Competition.* No claims were made that newspaper-television station owners have committed any specific non-competitive acts as such, but Rosse et al. attempt to show that, all other things held constant, newspaper-owned TV stations charge their advertisers high prices than other TV stations, and that this is probably due to the monopoly effect. Their calculations show that newspaper-owned TV stations charge about 15% higher rates. The NAB and ANPA statisticians see a conceptual error in Rosse's [1073] model—audience was omited as one explanatory variable, and when the error was corrected, the difference in prices between newspaper-owned TV stations and others was not statistically significant. The Post-Newsweek study also covered this point. The Commission's own examination of the point fails to show an effect on rates attributable to newspaper ownership. Levin uses past TV station sales prices as a measure of whether newspapers have been subsidizing their owned TV stations. He finds they have not.

97. *Effect of Common Ownership on Station Performance.* Both the Student Group and Levin did empirical analyses to determine if newspaper-owned TV stations differ from other TV stations in the quantities

of news, public affairs, local programming, etc., they present, and Levin also studied possible differences in diversity. Levin's findings appear to be inconclusive. The Student Group finds that there is no significant difference in the performance, between TV stations owned by local newspapers and other TV stations. Although the NAB findings use different methodology with the Student Group data, the results are essentially the same—no significant differences. A Commission staff study on this topic is attached as Appendix C. When the earlier submissions were prepared, the Annual Programming Reports for television stations had not yet become available. The Commission's study is the first to use this data. The American Institute conducted a study of public attitudes, behavior and knowledge of current events in two similar cities, to determine if media monopoly (Zanesville, Ohio) results in a less informed public than competitive media (York, Pennsylvania). The York population sample was found to be significantly more knowledgable on current events, and this was attributed to the fact that the only newspaper, TV station and AM/FM radio station in Zanesville were then controlled by a single owner. J. Anderson attempts to discover whether the informational content of the news broadcasts and daily papers of co-owned media show a greater correspondence than do media separately owned. He finds that TV-newspaper combinations and radio-newspaper combinations do not result in a monolithic presentation of information, in the many sample cities studied. Cox Broadcasting's two studies result in similar findings for two specific markets where they own newspapers and broadcast stations—Atlanta and Dayton.

98. *Multiplicity and Diversity of the Media.* Sterling shows that the number and proportion of newspaper-owned broadcast stations has been on the decline since 1950. Udell says that newspaper-owned TV stations have declined from 29% (of all TV stations) in 1955 to 14% in 1969. He also points out that there has been growth in the TV industry in spite of newspaper ownership in many markets. The ANPA staff study presents tabulations that confirm the downward trend and they also show that the total media voices (including magazines and other publications) is extremely high in most markets (e.g. 660 in Washington, D.C.). Seiden's study, counting all the media voices in the ADI counties of each market, also presents high figures (e.g. 98 in San Diego; 610 in New York City). Wilcox in his submission seems to suggest that newspapers and broadcasters are not instrumental in shaping public opinion, and that with the enormous volume and contradictory [1074] viewpoints presented, people are overwhelmed and reject everything. The Commission does not believe that "counts" as such add much to our knowledge as they fail to consider the particular characteristics that assume considerable significance in many situations.

CONCLUSIONS

99. *Introduction.* It has been clear in reviewing the record of this proceeding that additional public interest considerations need to be applied in judging the public interest consequences of present as distinguished from future common ownership interests in co-located newspapers and stations. Put otherwise, the idea of divestiture, implicit in retrospective rules, requires a demonstration of more than just theory or a resting on

narrowly drawn balances. Rather, we must consider the impact that divestiture would have, taking into account factors not present in connection with prospective rules, matters which must be examined in fairness is to be achieved. Before we proceed with our discussion of these two aspects separately, there are a number of general observations to be made about the public policy on which Commision action is based. The multiple ownership rules rest on two foundations: the twin goals of diversity of viewpoints and economic competition. The Commission has a responsibility to consider various aspects of the qualifications of licensees or applicants, among them the question of multiple ownership. In so doing, the Commission acts in individual cases or through rule making. Early in its history, the Commission acted to adopt rules to end common ownership of stations in the same service serving substantially the same area. Needless to say, such commonly owned stations could neither be true competitors nor could they offer true diversity. Since then the multiple ownership rules have been extended in a number of respects to better serve one or both of the above goals. As to competition in particular, the national public policy (expressed in anti-trust laws and elsewhere) in favor of competition and against actions which would curtail it, finds a reflection in the actions of the Commission. Sometimes, this policy will yield, however, to the even higher goals of diversity and the delivery of quality broadcasting service to the American people. This is a vitally important matter, for it is essential to a democracy that its electorate be informed and have access to divergent viewpoints on controversial issues. Needless to say, thought had to be given to how

much diversity to seek in terms of providing the best practicable service to the American public.[20]

100. *Prospective Rules.* While there can be no doubt that newspapers brought a pioneering spirit to broadcasting, first in radio and then in television, it does necessarily follow that new co-located co-ownership always would serve the public interest in the same way. In [1075] no way does this suggest a lack of recognition of the efforts made by the pioneers. Rather, it speaks to the issues raised when possible new entrants step forward. Now, unlike then, the broadcast medium has matured. While not all have made profits, for the most part, it is the particular market situation, or the newness of the operation that is the cause. Thus, the special reason for encouraging newspaper ownership, even at the cost of a lessened diversity, is no longer generally operative in the way it once was. Nor are newspapers the sole reservoir of experience on which reliance has to be placed. To the extent that TV (or radio) facilities are worth applying for, qualified and experienced applicants can be expected to step forward. Newspapers are not the only interested parties. The Commission is obliged to give recognition to the changes which have taken place

[20]Sometimes there can be a clash between the goals of diversity and competition. Such is the situation in *Carroll* cases where we consider whether the addition of a station in a locality would damage an existing station's ability to program in the public interest, and whether the proposed station would function as a substitute for it. Leaving aside the quantum of proof required, at their core these cases say that the loss to the public is of such importance that even the goal of competition must take second place. It should be noted that the Commission's function is not to protect stations from competition and the public interest is not disserved even at a station's demise, so long as another takes its place in providing public service programming.

and see to it that its rules adequately reflect the situation as it is, not was.

101. The thrust of recent rule changes in the area of multiple ownership as well as the underlying principles go in the direction of increased diversity. It appears that the licensing of a newspaper applicant for a new station in the same city as that in which the paper is published is not going to add to already existing choices, is not going to enhance diversity. In fact, since the number of channels open for filing has vastly diminished, the channel in question may be the last or one of the last available for the community. All this leads us to conclude that steps need to be taken in this regard. We think that any new licensing should be expected to add to local diversity. Accordingly, the rules will bar combinations that would not do so. Not all print media are equal or are generally circulated. Thus, we do not believe that weekly newspapers or specialized publications (including foreign language dailies) need to be included in the prohibitions we are adopting. Their situation would be different, for much of the audience of a station owned by such an entity would receive that entity's views for the first time. Each such publication is a relatively unimportant fraction of the media mix in a particular area. For this reason and because of the sheer size of daily newspapers, we shall limit the rule to daily[21] newspapers of general circulation. For the purpose of this rule, collegiate papers, even if dailies, are not considered to be circulated generally.

[21] For this purpose we are using the print media definition of a daily, i.e., published 4 times a week or more, in contrast to weekly, semi-weekly, or tri-weekly publications.

102. Since there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership, some limit needs to be placed on the geographic effect of the rule. We have adopted in this proceeding which bars new TV-radio combinations within certain specified contours, namely Grade A for television, 2 mV/m for AM and 1 mV/m for FM.[22] The rule would bar newspaper ownership if the predicted contours encompassed the city in which the daily newspaper is published.[23]

[1076] 103. The rule will apply to new ownership patterns however created, whether by initial application and construction or by acquisition. In fact, the latter category is perhaps an even greater cause for concern since there would be a loss of an already existing separate voice if a separately owned station were acquired by a paper. In addition, once a sale is to take place the rule would require a split in an existing combination. No divestiture would be effected nor hardship created since this is a voluntary action by the seller. Thus the rule will apply to all applications for assignment or transfer other than those to heirs or legatees or those for *pro-forma* changes in ownership.[24]

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[22] For an explanation of this rule, see para. 3 and footnote 2, *supra*.

[23] Any concern that this restriction could be avoided by simply proposing facilities sufficiently limited to prevent encompassment can be resolved when it is recognized that the Commission has already designated applications for hearing on "307(b) efficiency" issues when this happened in connection with the current multiple ownership rules. If the multiple ownership situation arguably would lead to artificial restrictions on station facilities, such matters could be explored in hearing.

[24] Parties believing that survival of both entities depends on their joint sale may make such an argument in seeking waiver of this requirement.

In addition to barring daily newspapers from acquiring a station if any of the above-mentioned contours encompass the newspaper community, we shall prohibit grant of a renewal to any station which acquires such a newspaper.[25]

104. The new rule will apply to radio, as well as television applications. While on the one hand it could be argued that the larger number of radio facilities means there already is more diversity than in television, the fact is that we wish to encourage still greater diversity. This to us is a worthwhile goal which does not depend on its being urgent to be justified. Since diversity can be fostered through prospective rules without the fundamental disruption that would occur with altering all current ownership patterns, even a smaller grain is worth pursuing. Also this is the same approach we took in regard to radio-TV combinations, where it, too, could be argued that the numbers suggested no need for concern if a television station acquired a radio station. The effect of the new rule could also be expected to enhance at least to some degree competition in the media.

105. The portion of the multiple ownership rules being amended today has come to be known as the "duopoly" portion of those rules (as contrasted with the seven-station portion). Originally, the duopoly rules proscribed common ownership, operation, or control of

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[25] As proposed in the *Further Notice*, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of its stations there within 1 year or by the time of its next renewal date, whichever is longer. If the newspaper is purchased less than a year from the expiration of the license, the renewal application may be filed, but it will be deferred pending sale of the station, if necessary, until the year has expired.

two broadcast stations in the same broadcast service serving substantially the same area. Later the proscription was changed to proscribe common ownership, operation or control of two stations in the same broadcast service if specified contours of the stations overlapped (Grade B for television, 1 mV/m for AM and for FM). Then, at an earlier stage of this proceeding, the duopoly rules were amended to cut across broadcast service lines, namely, VHF television and radio. Today they are further amended to include daily newspapers.

106. In discussing duopoly in the preceding parts of this document we have, for the sake of convenience, spoken solely of common ownership of media. However, it is necessary to take cognizance of the other terms in the duopoly rule as well, since not only common ownership is proscribed, but also common operation or control. It is clear that under the original rule, a party owning 100% of an AM station [1077] was prevented from owning 100% of another AM station serving substantially the same area. However, what if he owned 100% of one station and although having no ownership interest in the other he was a director or an officer therof? Did such a position constitute "control" of the other station so that the proscription of the rule applied? What if a party had no ownership interest in either station but was director of each, or was an officer of one and general manager of the other? What if he had a minority stock interest in one and was an officer of the other? Was this proscribed? The Commission, by ruling on such questions on a case-by-case basis over the years, has developed policy concerning them. In the earlier stages of this proceeding we indicated that the policy as

originally developed for stations in the same broadcast service would be carried over and applied to such cross-interests in VHF and radio stations (22 F.C.C. 2d 306 at 324-5; 28 F.C.C. 2d 662 at 669-670). In the *Further Notice* (22 F.C.C. 2d 339 at 349) we proposed to apply the policy to any new rules that might be adopted herein with regard to newspapers and invited comments on the subject. Nothing filed in response to this invitation suggests a need for different treatment, and we shall therefore adhere to the policy in administering the new rules adopted today.

107. The Commission's present rules proscribing acquisition of common ownership of stations in different services in the same market apply with full force to VHF television stations. However, as to UHF stations, the prohibitions do not apply. Instead, a case-by-case approach is followed. After careful consideration we have decided not to follow this distinction in connection with newspaper-television common ownership. Arguably, some of the same reasons which applied previously and upon which the distinction was created might be said to be present here. Admittedly, there is some commonality in the two areas of the rules in terms of how we should treat UHF stations, but we see even more that is distinctive. Thus, the level of concern over common ownership of an FM station and a UHF television station (a matter handled on a case-by-case basis) is not the same as with a daily newspaper and UHF stations. The latter combination results in a much more imposing entity in most cases. Sometimes, of course, the broadcast-broadcast common ownership situation would raise a problem; hence we provide for treatment of these cases on an *ad hoc* basis. Here the reverse of the

broadcast-broadcast combination situation is to be expected. Presumptively, the creation of new television station-daily newspaper combinations or a sale of an existing combination raises a problem. This may not always be the case, but since parties can seek waiver, there is a protection in the event that in a particular case our approach could be unduly harsh. We wish to act to encourage even greater diversity than we now have and think therefore that UHF should not be exempted as a matter of course. As to the view to be taken regarding the significance of operation on a UHF channel as it relates to the question of possible divestiture, discussed below, we believe that the cases needed to be judged on their own terms and not based on any assumption that stations on UHF channels have an inferior position in the market. In only one of the cases where the question of possible divestiture exists does this apply, and from [1078] the information now before us, exemption on this basis would not appear to be warranted.

108. *Divestiture.* We now turn to the most difficult of the questions before us: should divestiture be required? and if so, to what extent? We have been told by some parties that common ownership of daily newspaper and a broadcast station raises such a problem as to require divestiture wherever the two entities are co-located. To some extent, in making this argument, reliance is placed on the economic strength of the combination, in terms of their revenues or the percentage of the market advertising revenues the two control. Others place reliance on circulation figures to show the power of the combination. In either instance, we are asked to require the current owner to divest in the hope or expectation that a change in ownership

would bring public benefits. The principal benefit mentioned by others is the gain in diversity which the new owner would bring. Still others recognizing that distruption would attend the implementation of any such requirement urge it only in egregious cases. In part this is seen as a matter of fairness, in part it rests on the view that the need is not so great in other cases. We remain no less convinced than before of the importance of diversity, but this is not the only point to consider. Our examination of the situation leads us to conclude that we may have given too little weight to the consequences which could be expected to attend a focus on the abstract goal alone. There are a number of public interest consequences which form the basis of our concern. Requiring divestiture could reduce local ownership as well as the involvement of owners in management as many sales would have to be outside interests. The continuity of operation would be broken as the new owner would lack the long knowledge of the community and would have to begin raw. Local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too. None of these points was given consideration when we spoke in more sweeping terms at an earlier stage of this proceeding.

109. In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in

many areas. Particularly in connection with a number of entities, there is a long record of service to the public.[26] Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough. Unlike for prospective rules, divestiture introduces the possibility of distruption for the industry and hardship for individual owners.

110. We agree with the Justice Department that the Commission, like any other regulatory agency, must consider the anti-trust implications [1079] of its actions. Indeed, the relationship between anti-trust law and administrative law is necessarily a complementary one in which "the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of the anti-trust law is the same." *Northern Natural Gas Co. v. F.P.C.*, 399 F. 2d 953 at 959 (D.C. Cir. 1968). On the other hand, as Judge Wright succinctly stated in *Northern Natural Gas Co., supra,* 399 F. 2d at 960-961:

> This is not to suggest, however that regulatory agencies have jurisdiction to determine violations of the antitrust laws. See *People of the State of California v. F.P.C., supra,* 369 U.S. at 490, 82 S. Ct. 901; *United States v. Radio Corporation of America, supra,* 358 U.S. at 350, n. 18, 79 S. Ct. 457; *National Broadcasting Co. v. United States,*

[26] A careful comparison has been made by the Commission's staff between like television stations differing only in whether or not they were owned by newspapers. The findings, attached hereto as Appendix C, show an undramatic but nonetheless statistically significant superiority in newspaper owned television stations in a number of program particulars. This material is derived from material contained in the first annual program report.

> 319 U.S. 190, 223-224, 73 S. Ct. 990 (1943); *Mansfield Journal Co. v. FCC,* 86 U.S. App. D.C. 102, 107, 180 F. 2d 23, 33 (1950). Nor are the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. In short, the antritrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest'." *F.M.C. v. Aktiebolaget Sevenska Amerika Linien, supra,* 390 U.S. at 244, 88 S. Ct. at 1009.

Accordingly, we have analyzed the basic media ownership questions as a means of enhancing diversity in programming service to the public—rather than in terms of a strictly anti-trust approach. Indeed, we have taken into consideration such matters such as potential distruption of the broadcast industry which may not have been relevant from an antitrust analysis, but are intimately involved with important public interest considerations which this agency cannot ignore.

111. The distinction between our approach and the Justice Department's is best put this way. Justice and others applying traditional anti-trust criteria are primarily interested in preserving competition in advertising.[27] They place a greater emphasis on public policies

[27] This is not to suggest that we agree that any showing of higher prices has been made. The point was simply that Justice has applied a traditional competitive view whereas the Commission needs to look to other, even more vital, concerns as well. So it is too with the de Jonckheere approach to examining market concentration that does not give adequate attention to the core concern: diversity of programming service to the public.

underlying the need to preserve competition than on diversity aspects and for their arguments they use analytic tools taken from economic studies of market share and the like. Conversely, the diversity approach would examine the number of voices available to the people of a given area.[28] The premise is that a democratic society cannot function without the clash of divergent views. It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility. If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. This is not a reflection on the efforts of combination owners in diligently serving the public interest. Rather, it is a recognition that it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. [1080] The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.

112. Having said that our primary concern is diversity in programming service, we have analyzed the question of requiring full-scale divestiture under standards and with regard for considerations which are relevant under our broad public interest mandate. This does not mean that the Justice Department's concern for economic competition is irrelevant; only that it is of secondary concern under the Commission's regulatory responsibilities.[29] After reviewing the record in

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[28]The Seiden approach is totally unrealistic in its inclusion of any publication or station that reaches even a small fragment of the market and moreover deals not at all with local issues.

[29]We shall examine allegations of economic monopolization which might warrant actions under the Sherman Act on an *ad*

[footnote continued]

this context, we believe that because of the disruption and losses which could be expected to attend

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hoc basis in the future in those remaining circumstances where monopolization arguments might still be raised. (See para. 130, *infra*.) Moreover, we note that the Department of Justice, rather than submit data upon which industry-wide divestiture could be based, has offered general observations regarding the need for media competition and its concern about daily newspaper-VHF television combinations. Other parties have not had a proper opportunity to address the Department's separate filings with respect to the renewal applications for several stations and we doubt, in any event, that they would provide an appropriate basis for formulation of a general standard. Action on these pleadings will be taken in connection with the renewal applications in question. The Department has not offered us specific data in this proceeding on which to rely in applying anti-trust standards. Instead, it says that we are under an obligation to consider the competitive principles underlying the anti-trust laws. While we agree fully, we do not find that the data before us provide a footing for more severe action than we are taking. Divestiture has a substantial impact, and should be required only when we can determine that it is required by the public interest. We agree that it is not necessary to have proof of abuses before we can act, and we recognize that trading of stations would tend to lessen concern based on financial losses or investment uncertainty. However, we do not think that these considerations are a substitute for the requirement of a stronger showing than we have of the need for such a severe remedy on a broader basis. Even if some disruption occurs, we have acted to divest where competition and diversity are absent. Extending this to apply to all newspaper-television combinations, regardless of competition, is not warranted on the record before us and would cause serious public injury. We cannot rest upon an assertion that pricing may not be as competitive simply on the basis that it is "reasonable to assume" so. Merely stating that all daily newspaper-VHF television combinations are inconsistent with the public interest and the anti-trust laws is not enough. The Department urges that the degree of concentration is striking, but at present, 79 television stations are owned partly or wholly in common with daily newspapers published in the same locality. This number represents about 10.4% of the 757 commercial

[footnote continued]

divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases.[30] We have examined instances where there is co-located common ownership of a daily newspaper and a television and/or radio station to see which situations, if any, require action. In doing so we had to select some standards. As in all such efforts, the standards are not necessarily the only ones that could have been selected. We think the ones we have chosen are suitable and in fact preferable to other possibile formulations. Nevertheless, we recognize that others would have preferred more or less stringent standards. A choice had to be made, and it had to rest on a valid and comprehensive foundation. We think it does, even if it is not the only possible formulation or does not represent the only point at which a balance could be struck. Before describing the standards it might be [1081] helpful to explain the criteria we

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television stations on the air. If newspaper stations elsewhere are included the figure nears 14%, which is far below the 48% figure that obtained in 1948. A similar pattern of a continuing separation of daily newspapers and television stations in the same locality can be observed during the period of this proceeding. Thus, the 1970 figure of 96 co-located newspaper-television combinations dropped to 94 the next year and to 83 by April of 1974. By July of 1974 the figure had dropped still further to 79. Further reduction will take place as a result of our action here and through continuation of already begun changes in patterns of station ownership. We have drawn a line that is based on competition as well as diversity of voices and our experience suggests that there is neither need nor wisdom in going beyond it.

[30]There is another point, too, that with prospective rules as is the case with new applicants, even a small gain in diversity can be the basis for the requirement. Far more must be shown to warrant forcing an entity to dispose of its interest, and many cases lack any such urgency.

used. We were greatly concerned about a lack of diversity that reaches a point sufficient to constitute an effective monopoly in the marketplace of ideas as well as economically. This did not mean, for example, that no magazines or other periodicals entered the market, or that no other radio or television station could be received there. Aside from the fact that such media outlets often had only a tiny fraction in the market, they were not given real weight since they often dealt exclusively with regional or national issues and ignored local issues. If they did deal with locally oriented issues, it was their own locality that was the focus. Such a situation does not bespeak a real diversity on vital issues of local concern. In fact, it is local issues on which so much decision making by the electorate is required, and on which the level of diversity provided by incoming media is lowest. Accordingly, we made an effort to determine whether diversity, real community-wide diversity, was present on such topics of local concern. As to prospective interests, we concluded that we were free to act to foster diversity without being concerned about negative impact from our action. As to interests already in existence, however, we concluded that a recognition needed to be given to such concerns and we used as a guideline whether a single full-fledged choice was available. We thought it would suffice, provided it was one which we could be expected to deal with matters of local concern. In such cases there would not be such an unacceptable level of undue concentration. We looked then to incoming signals as a basis for exemption from divestiture.[31]

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[31]Of course a daily newspaper competitor would equally well suffice to remove the combination from the ambit of the rules, but in these cases none were found.

113. We examined all the instances known to us[32] of common ownership of the only daily newspaper with the only local radio or television station. Not all, it turned out, represented true monopoly situations, and stations were removed from the list if a direct competitor was found. In some of these instances, although only one station might be licensed to a city (such as Norfolk, Virginia) the truth is that the industry and local residents alike perceive the other stations licensed to other cities in the area (in that case Tidewater, Virginia which includes the cities of Hampton, Portsmouth and Newport News) as local, and they so function in terms of responding to local problems. In such cases, there is true (even if not unlimited) diversity. Sometimes, the situations were not so clear-cut.

114. Ascertaining and endeavoring to serve local needs was the key point, and some standard had to be developed to indicate where this was a reasonable expectation and where it was not. We did not believe that determining that a signal (regardless of whether it was city-grade, Grade A or Grade B) could be received, would suffice. We drew the line so as to require encompassment of the newspaper locality[33] by the

[32]While we are reasonably sure about the information in question, absolute certainty is not possible. Neither at the Commission nor in any trade publication (print or broadcast) is there a definitive list of these common ownership situations. This information is called for only indirectly in station ownership reports and they are at best only a partial source of information. As a result we contemplate a change in the ownership reports to have specific disclosure of all media ownership.

[33]Although the rule does not rest on this premise, in each instance the location is identical to that of the co-owned station's community of license.

[1082] city grade signal[34] of another commercial television (or radio) station.[35] There are two reasons for selecting this standard. First of all, dependable coverage of the community in question would be provided, but even more importantly, because of the proximity of the station to the city in question, such stations could be expected to serve the needs of the newspaper locality as well as their own. While it is true that another signal level could have been used if we were only concerned with reception of the station, we

[34]For AM and FM, the city-grade signal levels are 5 mV/m and 3.16 mV/m. respectively. For all stations, encompassment by a city-grade signal means the same as encompassment by a principal community contour.

[35]The question immediately arises of what to do about translators and satellites. As to the former, little could be expected in terms of coverage of diversity. The station whose signal is translated is often quite far away and the existence of a translator has no bearing on the stations' obligation regarding ascertainment of community problems. In effect then, even if the translator provides a dependable signal throughout the monopoly community, it cannot be relied upon to bring in a service attuned to the needs of the monopoly community. Satellites present a more difficult problem as they do operate with more substantial facilities and the primary station is obliged to carry some programming attuned to the needs of the satellite community. We do not believe that this is sufficient to demonstrate diversity unless the satellite has a local studio from which public affairs and news programs can and do originate. Such a station (in effect a semi-satellite) would suffice to demonstrate diversity. Educational stations are not under an obligation to provide the full range of responsive programming as are commercial stations, and we cannot ignore their specialization. It is more than lack of commercials that sets them apart. Since they cannot be equated with commercial stations, we shall not exempt based on encompassment by an educational station. So, too, with foreign stations which have no obligation to serve the needs of their American audiences or to deal with issues of concern to them.

do not believe that this would have been satisfactory. We think the focus properly belongs on the responsiveness of the outside station to local problems and needs. While the entertainment offerings of more distant stations garner many viewers, such is not the expectation for public affairs programs. Even if many did watch, little of this material could be expected to deal with problems of the newspaper community. It is unrealistic to imagine that these outside stations, not providing a city-grade signal, would be able to give meaningful responses to the needs of the distant newspaper locality, and it would be unfair to impose any such burden on them to attempt it. It is for these reasons that we cannot base our decision on overall viewing patterns as such. Rather, it must be on whether an outside station can be expected to provide meaningful attention to local problems and issues. Some would argue, no doubt, that all of these monopoly situations require divestiture even if a city-grade signal of an outside station encompasses the city in question. We see several problems with such an approach. First, some of these cases are labeled monopolies arbitrarily because only one channel is licensed to a particular city even though others are licensed to cities which together are part of a hyphenated market. Sometimes the residents of the individual communities themselves think of the area as joined together in the sense that local problems and their solutions transcend the borders of the separate cities involved. In such situations, the other stations in the market do direct themselves to the problem faced in common. In fact a question might well be raised in such situations if they did not do so. Even in situations where the communities involved are not so tightly bound, we believe that the attention to local problems outside stations could be expected to

provide is sufficient to demonstrate the existence of adequate diversity. This is premised on the [1083] efforts of these stations to ascertain and endeavor to serve the needs of a monopoly community which they encompass with a city-grade signal,[36] efforts which need be undertaken. Although we continue to believe that divestiture is a harsh remedy, one to be reserved only where the need is overwhelming and the evidence unambiguous, it is equally clear that in some circumstances, no other answer can be given. We believe such to be the case where two city-grade signals are not present that offer an effective juxtaposing of views on local issues. In our view, this country can ill afford a monopoly on the expression of views of issues of local concern. This basis for divestiture, however, is a far cry from one based only on some theoretical increase in already existing diversity which might follow from such action and would ignore the ramifications of such a step. Accordingly, we do not believe that further divestiture can be defended.

115. Up to this point we have not attempted to distinguish radio stations from television stations in terms of the need for divestiture or to indicate the reasoning underlying our views on each. As will be clear from the discussion which follows, we are applying the same standards to a radio monopoly co-owned with a monopoly newspaper as we have to a television monopoly with a newspaper connection. Radio and television are

[36] Stations have a secondary obligation to provide service to areas outside their city of license. In a number of instances stations which place city-grade signals over monopoly communities are addressing themselves to the problems, needs and interests of those communities. Stations in a similar posture should recognize and undertake to serve, on a secondary basis, these monopoly communities.

given parallel treatment, based on encompassment by a city-grade signal. We are not unaware of the fact that in the cases where the television station and newspaper are the only ones of each in the locality, a city-grade radio signal may very well encompass the city.[37] This fact, in our view, is not sufficient to change matters. Realistically, a radio station cannot be considered the equal of either the paper or the television station in any sense, least of all in terms of being a source for news or for being the medium turned to for discussion of matters of local concern. When the weight of a daily newspaper and the commonly owned television station (perhaps with a radio station or even an AM-FM combination under common control) are combined, the radio station standing by itself cannot be considered as providing significant diversity or as constituting a meaningful competitor at all. Accordingly, the rule shall not provide an exemption based on encompassment of the monopoly television-encompassment by a television station. Weekly newspapers, likewise, have too small an impact in comparison to the daily newspaper-television station combination to provide a basis for an exception.

116. As to the situations where there is no local TV station and the only radio stations are owned in common with the only daily newspaper, we are of the view that the combined importance of the daily newspaper and the radio station(s)[38] is akin to that of a television-newspaper combination in the television cities. It must be remembered [1084] in this

[37] In fact, such ordinarily would be our expectation, as a community large enough to support a television station could be expected to have a number of radio stations, at least one of which would be separately owned from the newspaper.

[38] In some instances AM stations alone, in others AM-FM combinations.

connection that there is no local television station to which the local resident can turn and in most cases no incoming city-grade television signal from another community. (In one case, that of Miles City, Montana, there is a television station licensed to serve that community, and we believe this fact sufficient to demonstrate adequate diversity.) Also, because of the much greater number of licensed radio stations, the expectation would be that a choice of signals would be the norm. Thus, the places lacking any other city-grade radio signal[39] could be viewed as isolated. In the smaller non-television communities, radio stations play a truly vital part in local affairs and their efforts and importance can exceed the level reachable by television stations in larger markets. These media outlets are a much more central focus in these smaller communities. Even if a television city-grade signal encompasses the newspaper-radio monopoly community it does not follow that the station would provide effective diversity in that community. The outside television station would not be expected to be attuned to meeting the local problems, needs, and interests of these smaller newspaper-radio communities.

117. The rules we have fashioned will prohibit the monopoly situations described above and will require divestiture no later than January 1, 1980.[40] In the case

[39] The reference is to daytime coverage, and the reason for this is quite simple: the data on file at the Commission do not suffice to give an accurate current picture of nighttime AM coverage without the most painstaking examination of each case and a total restructuring of the maps and other data submitted by the stations to take into account all subsequent developments.

[40] This period of five years represents to us a proper balance between the private equities involved and the need for such dispatch as circumstances allow.

of newspaper-television station monopolies either property could be sold.[41] In the case of radio-newspaper monopolies either the newspaper or a radio station would have to be sold, so if there were an AM-FM combination involved, the affected party need only dispose of one of the stations.[42] Since AM-FM combinations are not precluded by the rules, the AM-FM combination could be sold together.[43] Our goal, the creation of a competing source of news and public affairs programming attentive to the needs of the locality, could be thwarted if appropriate protections were not included to insure compliance with the requirements of the new rules. Thus, for example, there is a need to protect against a station's being offered for sale at a price out of keeping with its true value so that the owners could seek waiver on the basis of the inability to dispose of an interest to conform to the rules, we shall not give any weight to a showing that does not include a full description of the effort made to sell that interest, the price at which it was listed and a certification of a station (or if it applies, newspaper) broker that in his view this price is consistent with the fair market value of the station (or newspaper) in question.

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[41] If the present owner preferred, both the newspaper and the station could be sold but it would have to be to separate buyers.

[42] Some of the affected AM stations are full-time stations; others are daytime-only. Compliance may be achieved by divesting either of the stations regardless of its hours of operation, or by divesting both if that is preferred.

[43] We would not consider it compliance if a station were acquired solely to be divested and our expectation is that divestiture of a station not yet on the air would not constitute compliance with the rules.

[1085] 118. We anticipate a number of waiver requests. The following discussion sets forth some of the circumstances in which waivers, either permanent or temporary, might be granted.[44]

119. It is not our intention that the rules should work a forfeiture.[45] The rules are not in the least premised on the existence of improprieties in the operation of the media holdings. Thus, only a sale, not a loss is contemplated. For this reason, inability to sell the station would be a basis for waiver. Otherwise a refusal to grant a further renewal of license to the present licensee would work a forfeiture, a result contrary to our intent. We would take a similar view if the only sale possible would have to be at an artificially depressed price.[46] Likewise, if it could be shown that

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[44] The stations required to divest are listed in Appendix D and Appendix E to this document. As explained earlier (see fn. 33), the list is not to be taken as definitive. There may be additional stations within the ambit of the rules that do not have city-grade encompassment but nonetheless were not found in our search. Conversely, we may have included stations in the list that do not fit within the ambit—that for one reason or another should not have been included. Licensees of such stations can call such situations to our attention.

[45] Nevertheless, in recognition of the fact that we are requiring divestiture, we shall issue tax certificates to these parties pursuant to 26 U.S.C. 1071. We shall also do so in non-divestiture cases where current combinations are sold to separate owners in order to come into compliance with the new policy underlying the rule. We took this view earlier in this proceeding as to broadcast combinations—see the 1971 Memorandum Opinion and Order (28 F.C.C.2d 662 at 671) and the Public Notice of July 16, 1970. FCC 70-744.

[46] An appropriate showing would have to be made of the fair value and the inability to obtain such a price. Also, as with inability to sell at all, we do not contemplate permanent waiver, for problems in disposing of these interests would not be expected to endure indefinitely.

separate ownership and operation of the newspaper and station cannot be supported in the locality, waiver might well be appropriate. In any of these stances we contemplate waivers of reasonable duration, so that we shall not always be bound by the result based on outdated information. Finally, if it could be shown for whatever reason[47] that the purposes of the rule would be disserved by divestiture, if the rule, in other words, would be better served by continuation of the current ownership pattern, then waiver would be warranted. However, we would not be favorably inclined to grant any request premised on views rejected when the rule was adopted, as we do not intend to relitigate resolved issues.

120. On our own motion, in two cases we are exempting stations from divestiture because it is clear that for each case a waiver would be warranted. At Hickory, North Carolina, the television station operates on a UHF channel with highly limited facilities and without a network affiliation. Whether by net weekly circulation or any other measure, the station, its audience and hence its impact, is minor. Consequently there seems to be little basis for expecting any interest to be shown in acquiring this station. With Brookfield, Missouri, in the radio station list, it is equally clear that it is not on equal footing with the others in the group. By various indicia, both the station and the community are significantly different from the others. To neither of the above licensees would it be fair to insist that they go to the expense of filing a waiver request when the outcome is clear. Therefore we shall act now.

[47] Among others that parties may wish to bring to our attention are local access or origination on the community's cable television system or other special circumstances they think have a bearing on the appropriateness of granting waiver.

121. As to others desiring waiver we wish to make it clear that we do not contemplate holding evidentiary hearings on the individual [1086] waiver requests unless there are substantial issues of fact to be resolved. Lægal, as distinguished from factual issues, can just as well if not better be resolved without the need for an evidentiary hearing. An evidentiary hearing on the other hand could only cause delay and unnecessary expense to all concerned. There is no requirement for the holding of an evidentiary hearing imposed by law absent the raising of substantial factual issues and we shall not take on a pointless task.

122. The current state of the economy may suggest to some that any station sales could only be at a depressed price, but as pointed out previously, there is no need to sell now if it is more advantageous to wait. With a 5-year grace period for compliance, particular market conditions or even an overall market down turn would not provide a basis for obviating the divestiture requirement, unless such a condition were to last the full five-year period. Such a turn of events does now seem plausible, but even if we thought it were, any action on this basis would have to await future happenings. In the meantime, we expect that parties wishing to seek waiver of the divestiture requirement will file their requests within 6 months of the publication of this document in the Federal Register. This should be sufficient time to properly assay the applicable circumstances and to prepare even a lengthy request. We are not prepared to consider late-filed requests unless based on changed circumstances which would not have been anticipated.

123. *Miscellaneous Matters Relating to New Rules.* We have been urged to exempt Puerto Rico from any rules we might adopt. Whatever action might have been required if any divestiture were to take place there, the fact is that no divestiture is required. The arguments we have been offered dealt mostly with existing and not

future ownership combinations. In our view, the need for diversity is no less great in Puerto Rico than elsewhere, and we see no less need to apply the prospective rules there. To the extent a prospective applicant believes that special circumstances warrant deviation from the new requirements, it is at liberty to seek waiver to permit acceptance of a non-conforming application.

124. The suggestion has been made that we should act to help insure that ownership of any divested station should pass to minority group ownership. Secondarily we were urged to act similarly to encourage assignment to local (preferably minority) owners. The trouble with this request is that it appears to run afoul of Section 310(b) of the Communications Act of 1934, as amended. That provision specifically bars the Commission from considering whether the public interest would be served by transferring ownership to a party other than the one proposed in the application filed with the Commission. We inquired of the party urging this approach how it could be done consistent with Section 310(b) and were not offered any persuasive basis for believing it could be done. Accordingly, we shall not adopt such a requirement even obliquely as we were urged through requiring the assignor/transferor to attempt to find a buyer in keeping with the priorities urged by NCCB. However, it is clear that few stations are licensed to minority group owners. Divestiture might be an occasion for affected parties to consider this fact in reaching their decisions, but no requirement to this effect will be adopted.

[1087] 125. *Impact on comparative hearings involving regular renewal applicants.* Under the rules adopted herein, only a small number of co-owned broadcast-newspaper combinations are required to divest and no co-owned TV-radio combinations must do so. This raises a question

as to the effect our action taken today will have on comparative renewal proceedings when licenses not required to divest appl, for renewal of license and are challenged by a competing applicant. The answer to that question lies in the following discussion of our 1970 "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants" (22 F.C.C.2d 424).

126. In that statement we attempted to balance the benefits received by the public from the statutory spur inherent in the fact that there can be a challenge at renewal time against the value of not undermining predictability and stability of broadcast operation. The balance was struck by adopting a policy which provided that if a renewal applicant could show in a hearing with a competing applicant that its program service during the preceding license term had substantially met the needs and interest of its area (and that the operation of the station had not been characterized by serious deficiencies) the renewal applicant was given a controlling preference over the new applicant. In adopting this policy, we stated that as to the Commission's rules and policies governing diversification of the media of mass communications, where a renewal applicant with other media interests had in the past been awarded a grant as consistent with those rules and policies and thereafter rendered service that substantially met the needs and interests of its area it would be unfair and unsound to permit him to be ousted on the basis of a comparative demerit because of his media holdings. Our position was that as a general matter the renewal process is not an appropriate way to restructure the broadcast industry. Rather, we stated, this should be done in rule making proceedings.

127. The 1970 Policy Statement was struck down by the Court in *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201 (1971). The basis of the Court's action was that in a comparative hearing involving a regular renewal applicant, the Communications Act and *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), require a single full hearing in which the parties may produce evidence and be judged on the basis of all relevant criteria. It was the view of the court that the 1970 Policy Statement provided for a full comparison of the renewal applicant and the challenger only in cases where in the initial stage of the hearing the incumbent could not show a past record of substantial service without serious deficiencies. In other cases, the Court said, the challenger was given no hearing at all.

128. In ruling the 1970 Policy Statement illegal, the Court said (at fn. 33):

> Thus, without impinging at all upon the Commission's substantial discretion in weighing factors and granting licenses, our holding today merely requires the Commission to adhere to the comparative hearing procedure which it has followed without fail since *Ashbacker* and which has rightly come to be accepted by observers as a part of the due process owned to all mutually exclusive applications.

However, in such a single full comparative renewal hearing the Court observed that superior performance by an incumbent licensee should be a plus of major significance. This is because "[t]he court recognizes [1088] that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." (At fn. 35.) Nonetheless, it was the Court's view that "[d]iversification is a

factor properly to be weighed and balanced with other important factors, including the renewal applicant's prior record, at a renewal hearing." (At fn. 36.)

129. After the decision in *Citizens Communications Center*, the Commission (noting the doubts expressed by the Court as to procedures made by the Commission in adopting the 1970 Policy Statement) issued a Further Notice of Inquiry in Docket No. 19154 (31 F.C.C.2d 443 (1971)[48] inviting views of interested parties on the formulation of policy in this area that would be consistent with the Court's holding that a full hearing is required. That proceeding is still pending. The Commission has recently announced its intention to consider in the near future what its policy should be in this regard, but has not yet resolved the point. In the light of *Citizens Communications Center*, whatever policy is developed will take into account diversification as a factor that must be considered in a comparative renewal hearing. Also in the light of that case, the weighing of factors lies within the substantive discretion of the Commission, and the weight to be given the factor of diversity in comparative renewal hearings remains to be determined. Until such time as a new policy is formulated in Docket No. 19154, of necessity, under *Citizens Communications Center*, the factor of diversification must be considered in comparative renewal hearings, but the weight to be given that factor will be a matter within the discretion of the Commission. In connection with both any policy that may be developed and with comparative renewal

[48] The Commission had previously issued a Notice of Inquiry in that docket (27 F.C.C. 2d 580 (1971) to explore whether standards of "substantial service" could be developed for television broadcasting.

proceedings that may occur before the development of such policy, we reiterate what we have said on another occasion (31 F.C.C.2d 443 at 445), that we do not believe the Court in *Citizens Communications Center* is seeking to have the ownership patterns of the broadcast industry restructured through the renewal process; that, rather, any *overall* restructuring should be done in a rule making proceeding. And what we consider to be the necessary *overall* restructuring has been done today.

130. During the pendency of this proceeding, in situations involving petitions to deny renewal applications, the Court has approved our policy of refusing to consider questions of concentration of control unless specific abuses are shown. (*Hale v. F.C.C.*, 425 F.2d 556 (D.C. Cir. 1970); *Stone v. F.C.C.*, 466 F.2d 316 (D.C. Cir. 1972); *Columbus Broadcasting Coalition v. F.C.C.*, ____ F.2d ____ (D.C. Cir. 1974.)) Parties as of now may raise concentration issues in connection with such petitions. However, absent a showing of economic monopolization that might warrant actions under the Sherman Act, it would not be our view that such arguments would raise valid issues necessitating the designation of renewal applications for hearing. (See fn. 29, *supra*). We should make clear at this time that since the stations which are subject to the divestiture provisions are in effect under an order to terminate their present cross-ownership there would be no point in [1089] conducting protracted comparative hearings concerning those facilities during the interim period. Our finding that divestiture is required would obviously weaken their position in a comparative proceeding, but since we have determined that their present operations should be divested without regard to the quality of their service, as a means of improving the pattern of

ownership, we think it would be inequitable to subject them in their present posture to competitive challenge. Furthermore, any comparative hearings at renewal time would probably run through the date when divestiture must be accomplished; this would create a chaotic situation. In view of these considerations, interested parties should be advised that we do not contemplate conducting comparative hearings in the usual course when these licenses come up for renewal.

131. *Policy Regarding Non-Divestiture Combinations.* As we had occasion to observe in the earlier discussion of the comments, a number of parties argued for (or suggested as a substitute for a separation in ownership) requirements to insure separate operation of jointly owned media entities. Although we were not persuaded that their arguments offered a valid basis for obviating the need for divestiture, or for requiring separation in ownership on a prospective basis, we are persuaded that valid points exist in this argument. Various combination owners have stressed that their two media interests—print and broadcast—are operated separately. Even if separate operation cannot be equated with separate ownership, it is nonetheless an important point. Were it otherwise and the two operated jointly, it might have been necessary for the Commission to act to require divestiture in many more situations. If the power of the print-broadcast combination were exercised monolithically or if the print and media outlets were mirror images of one another, speaking with one voice, we would have to be concerned. In the divestiture cases, we held that even in the absence of specific abuses, the need to provide at least minimal diversity required action. As to the remaining instances of combination ownership, we believe some clarification in our expectations is required.

132. Many of the parties owning newspapers and broadcast stations in the same locality described how the two entities—print and broadcast—were separately operated. We were told that separate editorial and reportorial staffs were utilized. Many pointed to a separation in sales staff and an emphasis on competition between media. We endorse such efforts to insure a maximum of diversity and competition possible under the circumstances of common ownership and we commend those conscientious owners for their efforts.[49]

133. Based on the foregoing discussion, IT IS ORDERED, pursuant to the authority contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended, That Sections 73.35, 73.240 and 73.636 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix F, effective February 12, 1975, the date of publication of this document in the Federal Register. All [1090] applications not granted by that date shall be subject to the new rules. Since these rules embody important new policy having widespread effect, we believe that it is in the public interest to make the effective date February 12, 1975, rather than to delay the effective date to a time at least 30 days after publication in the Federal Register. 5 U.S.C. 553(d)(3).

134. IT IS FURTHER ORDERED, That the provisions of newly adopted Section 73.35(c) barring

[49] We do not intend any change in the traditional view taken regarding activities by the media which run afoul of the anti-trust laws. Common ownership in itself does not constitute an abuse. The subject of combination rates and joint sales practices is under consideration in a rule making proceeding in Docket No. 19789.

common ownership of the only AM station and a daily newspaper, and Section 73.636(c) barring common ownership of the only television station and daily newspaper ARE WAIVED insofar as they apply to such existing newspaper-broadcast combinations in Brookfield, Missouri, and Hickory, North Carolina.

135. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

Federal Communications Commission,
Vincent J. Mullins, *Secretary.*

APPENDIX A

Parties Filing Comments and Reply Comments in Response to Further Notice of Proposed Rulemaking in Docket No. 18110

Advance Publications
The Alexandria Gazette
All Channel Television Society
Allied Daily Newspapers of Washington
American Broadcasting Companies, Inc.
American Institute for Political Communication
American Newspaper Publishers Association
Argus Press Company
Arkansas Democrat Company
Arkansas Television Company
Auburn Publishing Company
Baton Rouge Broadcasting Co., Inc.
A.H. Belo Corporation
Robert W. Bennett
Joseph F. Biddle Publishing Company
Broadcast-Plaza, Inc.
Broadcasting and Film Commission, National Council of the Churches of Christ in the U.S.A.
Brockway Company
Buffalo Evening News, Inc. et al.
Bulletin Company
Canton Daily Ledger
Capitol Broadcasting Company
Capitol Broadcasting Company, Inc.
Carter Publications, Inc.
Cedar Rapids Television Company
Channel 6, Inc.
Chronicle Publishing Company, et al.
Coffeyville Publishing Company, Inc.

Columbia Broadcasting System, Inc.
Columbus Broadcasting Company, Inc.
Cosmos Broadcasting Corporation
Cox Broadcasting Corporation
Daily News
Daily News-Tribune
Daily Pantagraph
Daily Press, Inc.
Daily Record
The Day
Denton Record Chronicle
Dodge City Broadcasting Co., Inc.
Duhamel Broadcasting Enterprises
Easton Publishing Company
Elyria-Lorain Broadcasting Co.
Enterprise Publishing Company
Evening News Association
Evening Star Newspaper Company
Express Communications, Inc.
Finley Broadcasting Company, et al.
Fisher's Blend Station, Inc.
Florida Publishing Company
Helene R. Foellinger
Fort Myers Broadcasting Company
Forum Publishing Company, et al.
Forward Association
Forward Communications Corporation
C.D. Funk
Galesburg Broadcasting Company
Gazette Printing Company, et al.
Gazette Publishing Company
General Electric Broadcasting Company, Inc.
Richard Gilkey
Gray Communications Systems, Inc.
Green Bay Newspaper Company
Grit Publishing Co.
Guaranty Broadcasting Corporation
Guy Gannett Publishing Co., et al.
[1091] Ethel C. Hale, et al.
Hearst Corporation
Herald Association, Inc.
Herald Corporation
Houston Post Company, et al.
William F. Huffman Radio, Inc.
HUSE Publishing Company, et al.
Illini Publishing Company
Illinois Broadcasting Company, et al.
International Broadcasting Corporation, et al.
Jacksonville Journal Courier Co.
Jefferson Standard Broadcasting Co.
Jet Broadcasting Co., Inc.
Terrall M. de Jonckheere
Journal Company
Journal Review
Kansas State Network, Inc.
Kenosha News
Kid Broadcasting Corporation
KMSO-TV, Inc. et al.
KGVO Broadcasters, Inc. and KMSO-TV, Inc.
KSLA-TV, Inc.
KUTV Inc., et al.
Lawrence Daily Journal-World
Harvey J. Levin
Lexington Heraldleader Co.
Ed Livermore
Macomb Daily Journal
Marshfield News-Herald
McClatchy Newspapers
McClure Newspapers, Inc.

Medford Daily Mercury
Medford Mail Tribune
Meyer Broadcasting Company
Michigan Press Association
Mickelson Media, Inc., et al.
Midcontinent Broadcasting Company
Midnight Sun Broadcasters, Inc.
Midwest Radio-Television, Inc.
Midwestern Broadcasting Company
Minneapolis Star and Tribune Company
Mississippi Publishers Corporation
The Monitor
Multimedia, Inc.
National Associations of Broadcasters
Exhibit A
Exhibit B
Exhibit C
Exhibit D
Exhibit E
National Broadcasting Company, Inc.
National Newspaper Association
Nebraska Broadcasters Association
New England Daily Newspaper Association
Newhouse Broadcasting Corporation
The New Mexican
New York News, et al.
North Carolina Association of Broadcasters
North Carolina Television, Inc.
Ogden Newspapers
Ohio Newspaper Association
Oklahoma Broadcasters Association
Oklahoma Press Association
Owensboro Publishing Company
Paducah Newspapers, Inc.
R.W. Page Corporation
Palestine Herald-Press Company
Palmer Broadcasting Company, et al.
Palmetto Radio Corporation
Peninsula Newspapers Incorporated
Pioneer Valley Broadcasting Co., et al.
The Post Company
Pottsville Republican
Progress Broadcasting Corporation
Progressive Publishing Company, Inc.
Pulitizer Publishing Company
Quality Broadcasting Corporation
Quincy Newspapers, Inc., et al.
Radio Medford, Inc.
Reporter Printing Company
Ridder Publications, Inc.
Rock Island Broadcasting Company, et al.
James N. Rosse
Salina Radio, Inc.
Santa Barbara News-Press
Sarkes Tarzian, Inc.
John C. Schmarkey
Scottsbluff Daily Star-Herald
Scranton Times
Scripps-Howard Broadcasting Company, et al.
South Bend Tribune
Southern Minnesota Broadcasting Company
Stanford University, Research Center in Economic Growth
Stauffer Publications
Students' F.C.C. Study Group
Summit Radio Corporation
Telegraph-Bulletin
Telemundo, Inc., et al.
The Times Company
Times Herald Printing Company

Triangle Broadcasting Corporation
Tribune Company, et al.
Tribune Publishing Company
Truth Publishing Company, et al.
United States Department of Justice
Vindicator Printing Company, et al.
George R. Walker
Washington Post Company, et al.
WBNS-TV, Inc., et al.
WEEU Broadcasting Company
Westinghouse Broadcasting Company, Inc.
West Virginia Radio Corporation
[1092] WFLA, Inc.
WGAL Television, Inc., et al.
WHAS, Inc.
Wichita Falls Times, et al.
Williamson County Sun
Wisconsin Daily Newspaper League
WJAC Incorporated, et al.
WKBN Broadcasting Corporation
WKRG-TV, Inc.
The Woonsocket Call
World Publishing Company
WSM, Incorporated

Parties Filing Reply Comments

American Newspaper Publishers Association
Stephen R. Barnett
City Club of New York
Donrey, Inc.
Alfred H. Hemingway, Jr.
Dr. Harvey J. Levin
McClatchy Newspapers
National Association of Broadcasters
National Newspaper Association
Tribune Company, et al.
WGAL Television, Inc., et al.

Parties Filing Comments in Response to Memorandum Opinion and Order Announcing Oral Argument

American Broadcasting Companies, Inc.
American Newspaper Publishers Association
Les Anderson
Charles A. Baer
Buffalo Evening News, Inc. and WBEN, Inc.
Center for Policy Research, Inc.
Channel Two Television, Inc.
Chronicle Publishing Company and Chronicle Broadcasting Co.
Civil Liberties Union of Alabama and The Selma Project
Columbia Broadcasting System, Inc.
Cox Broadcasting Corporation
Donrey, Inc.
Duhamel Broadcasting Enterprises, Inc.
Effingham Broadcasting Company
Evening News Association, Lee Enterprises, Incorporated, and WKY Television System, Inc.
Gardner Advertising Company, Inc.

Houston Post Company (see Channel Two Television, Inc.)
Huntingdon Broadcasters, Inc.
Illinois Broadcasting Co., Inc. and Lindsay-Schaub Newspapers, Inc.
Justice, U.S. Department of
KCEN-TV (Channel 6, Inc.)
KSD, Incorporated
Labor Union News, Inc.
McClatchy Newspapers
McKenna, Wilkinson & Kittner
Metromedia, Inc.
Midwest Radio-Television (WCCO)
Minneapolis Star and Tribune Company
National Association of Broadcasters
National Broadcasting Company
National Citizens Committee for Broadcasting
National Newspaper Association
Omaha World Herald
The Post Company
Post-Newsweek Stations, Capital Area, Inc.
Progressive Publishing Company and KSD/KSD-TV, Inc.
Rocky Mountain Broadcasters Association
Summitt Radio Corporation
Telemundo, Inc., et al.
UHF Television Stations
George R. Walker
WJAG, Inc.
WKRG-TV, Inc.
WTMJ

Parties Filing Reply Comments in Response to Memorandum Opinion and Order Announcing Oral Argument

American Newspaper Publishers Association
Buffalo Evening News, Inc. and WBEN, Inc.
Center for Governmental Responsibility
KSL, Incorporated
KUTV, Inc., et al.
The Post Company
Post Newsweek Stations, Capital Area, Inc.

[1093]

APPENDIX B

MAJOR STUDIES SUBMITTED IN DOCKET NO. 18110 IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING

ECONOMIC CONSEQUENCES OF DIVESTITURE

ANPA Comments, Volume II:

(a) Study A—Frazier, Gross Associates, *Valuation of Newspaper Owned TV and Radio Stations.*

(b) Study B—First National City Bank, *Financial and Investment Issues of Forced Divestiture.*

EFFECTS OF COMMON OWNERSHIP ON COMPETITION

J. Rosse, B. Owen, D. Grey, *Economic Issues in Joint Ownership of Newspaper and TV Media* (Stanford University Research Center in Economic Growth Memorandum No. 97):

(a) See especially Appendix 1: B. Owen, *Empirical Results on the Price Effects of Joint Ownership in the Mass Media.*

J. Rosse, *Credible and Incredible Economic Evidence* (Reply Comments).

NAB Comments, Exhibit B (Revised): A. Lago and D. Osborne. *A Quantitative Analysis of the Price Effects of Joint Mass Communication Media Ownership.*

NAB Reply Comments:

(a) Appendix C: Addendum to Lago and Osborne (Exhibit B of NAB comments).

(b) Appendix D: Note by NAB Research Staff re: regression analysis of audience effects on price.

Appendix Note to Dr. Harvey Levin's reply comments.

EFFECTS OF COMMON OWNERSHIP ON STATION PERFORMANCE

Students' FCC Study Group, Comments filed by Albert Kramer, May 1971.

H. Levin, *The Policy on Joint Ownership of Newspapers and Television Stations: Some Assumptions, Objectives, Effects.*

H. Levin, Reply Comments.

ANPA Reply Comments, Appendix C: J. Udell, *Critique of Harvey Levin's Comments.*

NAB Reply Comments, Appendix B—on Levin's statement.

The American Institute for Political Communication, Washington, D.C., 1971, *The Effects of Local Media Monopoly on the Mass Mind.*

NAB Comments, Exhibit E: J. Anderson, *The Problem of Information Control: A Content Analysis of Local News Publication.*

Cox Broadcasting Corporation Comments:

(a) Appendix A: W. McDougald and E. Sasser, et al., *Atlanta Market News and Editorial Research Study.*

(b) Appendix B: J. Anderson and D. O. McDaniel, et al., *Two Studies: A Historical Analysis and Content Comparison of Cox Broadcasting Corporation's Affiliated News Media in Dayton, Ohio.*

MULTIPLICITY AND DIVERSITY OF MEDIA

NAB Comments, Exhibit C: C. Sterling, *Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922-1967.*

Study E–Staff Study by ANPA.

Study E–J. Udell, *Economic Consequences of FCC Proposal and Critique of Relevant Literature.*

NAB Comments, Exhibit A: M. Seiden, *Mass Communications in the United States, 1970 and Reply Comments of Stephen R. Barnett.*

ANPA Comments, Volume II, Study C: W. Wilcox, *Newspaper Journalism, Broadcast Journalism and the Community.*

Monopoly in the Media, by Terrall M. deJonckheere.

[1094]

FURTHER STUDIES SUBMITTED IN DOCKET NO. 18110 IN RESPONSE TO MEMORANDUM OPINION AND ORDER ANNOUNCING ORAL ARGUMENT

ECONOMIC CONSEQUENCES OF DIVESTITURE

No further empirical studies.

EFFECTS OF COMMON OWNERSHIP ON COMPETITION

Comments of Buffalo Evening News and WBEN Exhibit VIII.

Comments of Post-Newsweek Stations.

Supplementary Comments of Professor Harvey Levin.

EFFECTS OF COMMON OWNERSHIP ON STATION PERFORMANCE

Supplementary Comments of Professor Harvey Levin.

MULTIPLICITY AND DIVERSITY OF MEDIA

Comments of Metromedia (Attachments A–D).

Supplemental Comments of the Chronicle Publishing Co. and Chronicle Broadcasting Co.–Volume 1.

Supplement to National Association of Broadcasters Exhibit C Regarding Cross-Ownership of Broadcasting Stations and Newspaper; Supplemental Statement of NAB; Exhibit F Regarding Recent Transfer of Broadcast Stations (Revised).

Comments of Buffalo Evening News and WBEN–Exhibit VII.

APPENDIX C

STAFF STUDY OF 1973 TELEVISION STATION ANNUAL PROGRAMING REPORTS*

SUMMARY

It was found that on the average, co-located newspaper-owned TV stations programed 6% more local news, 9% more local non-entertainment, and 12% more total local including entertainment than do other TV stations. A regression analysis technique was used which holds constant the effects of the following factors: network affiliation, UHF or VHF, group ownership, revenue size, total minutes broadcast during the week and number of commercial stations in market. In each case these differences were statistically significant.

Prepared by: Research and Education Division of the Broadcast Bureau.

STAFF STUDY OF 1973 TV STATION ANNUAL PROGRAMING REPORTS

One of the questions raised in the current cross-ownership inquiry, is whether newspaper owned co-located TV stations program differently than other TV stations, with respect to news, public affairs or other non-entertainment programs, other factors being equal. In order to investigate this question the staff has studied the 1973 Annual Programing Reports, specifically the 18 program categories and day parts shown in Table 1. We find that for the sample composite week reported by the TV stations on their annual report, those stations owned by co-located newspapers broadcast significantly more minutes in several categories of local programing.

Methodology

A reduced form station model of local and public service programing was specified and then regression analysis was used to evaluate the model with each of the eighteen program categories as dependent variables. This method permits one to "hold constant" the other factors in the relationship.

[1095] The programing model was specified as:

$$P=b_0+b_1X_1+b_2X_2+b_3X_3+b_4X_4+b_5X_5+b_6X_6+b_7X_7+b_8X_8+e$$

where P = minutes of program category broadcast during the 1972-1973 composite week

X_1 =Channel type (VHF or UHF; VHF=1)
X_2 =CBS affiliation (Dummy variable, CBS=1)
X_3 =NBC affiliation (Dummy variable, NBC=1)[1]
X_4 =Newspaper joint ownership in same market (Dummy variable=1 if joint owned)
X_5 =Group ownership (Dummy variable=1 if group owned)
X_6 =Station revenue in thousands of dollars
X_7 =Number of commercial stations in station's market
X_8 =Total minutes broadcast (6 A.M.-Midnight during the composite week)

*None of the previous studies submitted by the parties had these reports yet available to them when they were prepared. Thus, Levin used data taken from *TV Guide* for his studies.

[1] The effect of ABC affiliation is captured in the intercept term.

c=Disturbance factor (assumed normally distributed with mean of zero and variance is σ^2)

In evaluating the model, the object was to rest the relationship between X_1 (newspaper joint ownership) and P (minutes of program category) for each of the eighteen program categories.[2] The null hypothesis for each of the eighteen program categories was that the newspaper joint ownership coefficient (b_3) is not significantly different from zero.[3]

Data

Data on the observations included in the study were drawn from a number of sources. Table 2 shows the source of data for each variable in the study.

In general, the analysis included observations from all network affiliates. Independent stations were not included because the number of co-located independent station-newspaper combinations was very small, and their programing patterns were different from affiliated stations. In addition, three other classes of stations were excluded: (1) stations outside the continental U.S., (2) satellite stations,

[2]It should be noted that the coefficients associated with the independent variables were not expected to remain constant across all programing categories. For example, the network terms were expected to be larger and more significant for categories that include all program sources than for categories that include local program sources only.

[3]Although the results show other significant relationships, this study was confined to the newspaper ownership factors.

and (3) stations in the top seven markets.[4] The stations in the top seven markets were omitted because previous work by the staff indicated that the stations in these markets behave somewhat differently than stations in other markets and would weigh the results of their large size. In any case, there were only two newspaper-TV co-located combinations in the top seven markets.

Findings

Table 3 shows the regression results for each of the eighteen programing categories. This table reports the coefficient (b), standard error of the coefficient (S_b) and t statistic for each of the eight independent variables across all eighteen program categories.

Hypothesis tests on the coefficient b, indicate that the quantitative effect of newspaper ownership on public service and local programing is not significantly different than zero in all but these three categories:

1. 6 A.M.-Midnight, local sources only, news, public affairs and "other" (ALNPO)

2. 6 A.M.-Midnight, local sources only, news (ALN)

3. 6 A.M.-Midnight, local sources only, all programming, including entertainment (ALNPOE)

Table 3 shows that all three of these coefficients are positive. Thus newspaper joint ownership tends

[4]The top seven markets were defined according to 1972 ARB ADI TV households rank; New York, Chicago, Los Angeles, Philadelphia, San Francisco, Boston, and Detroit.

to be associated with increased amounts of program time [1096] devoted to ALNPO, ALN, and ALNPOE. The amount of increase for each category is:

1. 6 A.M.-Midnight, local sources only, news, public affairs and "other"—55.74 minutes per week (9.0% over the mean of 614.76 minutes).

2. 6 A.M.-Midnight, local sources only, news—21.94 minutes per week (6.3% over the mean of 344.75 minutes)

3. 6 A.M.-Midnight, local sources only, all programing, including entertainment—94.78 minutes per week (12.5% over the mean of 757.10 minutes)

The conclusion is that television stations under joint ownership with a co-located newspaper quantitatively perform at least as well as other stations in the areas covered by this study; however these jointly owned stations broadcast significantly more minutes than other stations in several categories of local programing, other important factors being equal.

TABLE 1—PROGRAM CATEGORIES AND DAY PARTS

6 A.M.-Midnight. All Sources:
1. News, Public Affairs, and "Other".
2. News and Public Affairs.
3. News.
4. Public Affairs.

6 A.M.-Midnight, Local Sources Only:
1. News, Public Affairs, "Other"; and Entertainment.
2. News, Public Affairs, and "Other".
3. News and Public Affairs.
4. News.
5. Public Affairs.

TABLE 9, Continued:

Prime Time (6 P.M.-11 P.M.), All Sources:
1. News, Public Affairs, and "Other".
2. News and Public Affairs.
3. News.
4. Public Affairs.

Prime Time (6 P.M.-11 P.M.), Local Sources Only:
1. News, Public Affairs, "Other", and Entertainment.
2. News, Public Affairs, and "Other".
3. News and Public Affairs.
4. News.
5. Public Affairs.

TABLE 2—PROGRAM CATEGORIES AND DAY PARTS

6 A.M.-Midnight, All Sources:
1. News, Public Affairs, and "Other" ..... ANPO
2. News and Public Affairs ..... ANP
3. News ..... AN
4. Public Affairs ..... AP

6 A.M.-Midnight, Local Sources Only:
1. News, Public Affairs, "Other"; and Entertainment. ..... ALNPOE
2. News, Public Affairs, and "Other" ..... ALNPO
3. News and Public Affairs ..... ALNP
4. News ..... ALN
5. Public Affairs ..... ALP

Prime Time (6 P.M.-11 P.M.), All Sources:
1. News, Public Affairs, and "Other" ..... PNPO
2. News and Public Affairs ..... PNP
3. News ..... PN
4. Public Affairs ..... PP

Prime Time (6 P.M.-11 P.M.), Local Sources Only:
1. News, Public Affairs, "Other", and Entertainment. ..... PLNPOE
2. News, Public Affairs, and "Other" ..... PLNPO
3. News and Public Affairs ..... PLNP
4. News ..... PLN
5. Public Affairs ..... PLP

Note.—Codes in right column are abbreviations used in table 3.

TABLE 3

DEP. VARS. / IND. VARS.	ALNPO y=614.76 R^2=.369	ALNP y=462.41 R^2=.424	ALN y=344.75 R^2=.477	ALP y=117.65 R^2=.130	PLNPO y=156.63 R^2=.264	PLNP y=148.08 R^2=.292
Channel type: (VHF=1, dummy variable):						
B	59.78	53.07	54.30	−1.23	9.12	12.61
S	25.32	16.87	10.97	11.27	8.07	7.53
t	*2.36	**3.15	**4.95	−.11	1.13	1.68
CBS:						
B	−25.87	11.32	8.24	3.09	30.34	38.48
S	24.47	16.30	10.00	10.89	7.80	7.27
t	−1.06	.70	.78	.28	**5.05	**5.29
NBC:						
B	5.61	21.79	31.00	−9.80	51.47	46.00
S	23.81	15.86	10.31	10.59	7.59	7.08
t	.24	1.37	**3.06	−.93	**6.79	**6.50
Newspaper joint ownership:						
B	55.74	14.60	21.94	−7.34	2.73	4.40
S	25.85	17.22	11.20	11.50	8.24	7.68
t	*2.16	.85	*1.96	−.64	.33	.57

TABLE 3

DEP. VARS. / IND. VARS.	ALNPO y=614.76 R^2=.369	ALNP y=462.41 R^2=.424	ALN y=344.75 R^2=.477	ALP y=117.65 R^2=.130	PLNPO y=156.63 R^2=.264	PLNP y=148.08 R^2=.292
Group ownership:						
B	−23.15	−16.26	−7.54	−8.72	−5.71	−3.23
S	19.87	13.24	8.61	8.84	6.33	5.91
t	−1.17	−1.23	−.88	−.99	−.90	−.55
REY (X000) X=2,359.49:						
B	.04072	.03633	.02349	.01291	.01162	.01187
S	.00190	.00326	.00212	.00218	.00156	.00418
t	**8.31	**11.13	**11.03	**5.92	**7.44	**8.15
Number of commercial stations X=3.13:						
B	15.29	3.59	1.54	2.05	−1.48	−1.24
S	4.12	2.74	1.78	1.83	1.31	1.22
t	**3.71	1.31	.86	1.11	−1.13	−1.01
Total broadcast minutes:						
B	.15373	.09277	.06631	.02616	.01657	.01468
S	.02614	.01741	.01132	.01163	.00833	.00777
t	**5.88	**5.33	**5.86	*2.28	*1.99	1.89

DEP. VARS. IND. VARS.	PLN y=127.36 R^2=.267	PLP y=21.62 R^2=.057	ALNPOE y=757.10 R^2=.207	PLNPOE y=196.09 R^2=.138	ANPO y=1644.04 R^2=.464	ANP y=995.65 R^2=.532
Channel type: (VHF=1, dummy variable):						
B	13.50	−.97	−30.51	−14.36	99.46	56.20
S	6.73	3.38	43.33	13.63	35.23	21.77
t	*2.02	−.29	−.70	−1.05	**2.82	**2.58
CBS:						
B	33.25	5.22	−65.60	28.62	344.97	227.59
S	6.51	3.26	41.88	13.18	34.65	21.04
t	**5.11	1.60	−1.57	*2.17	**10.13	**10.81
NBC:						
B	39.61	6.38	−21.06	53.67	185.74	241.22
S	6.33	3.17	40.74	12.82	33.13	20.47
t	**6.26	*2.01	−.52	**4.19	**5.61	**11.78
Newspaper joint ownership:						
B	6.33	−1.95	94.78	24.26	35.40	7.40
S	6.87	3.43	44.23	13.92	35.97	22.23
t	.92	−.57	*2.14	1.74	.98	.32

DEP. VARS. IND. VARS.	PLN y=127.36 R^2=.267	PLP y=21.62 R^2=.057	ALNPOE y=757.10 R^2=.207	PLNPOE y=196.09 R^2=.138	ANPO y=1644.04 R^2=.464	ANP y=995.65 R^2=.532
Group ownership:						
B	−3.36	N/S	−59.29	−18.46	−35.74	−16.12
S	5.29	.....	34.01	10.70	27.65	17.00
t	−.64	.....	−1.74	−1.73	−1.29	−.97
REY (X000) X=2.359.49						
B	.00909	.00279	.04924	.01226	.03341	.03219
S	.00310	.00064	.00839	.00264	.00632	.00421
t	**6.98	**4.34	**5.87	**4.64	**4.90	**7.64
Number of commercial stations X=3.13:						
B	−.80	−.43	14.29	.66	12.23	2.15
S	1.10	.55	7.05	2.22	5.73	3.54
t	−.73	−.79	*2.03	.30	*2.13	.61
Total broadcast minutes:						
B	.01383	.00087	.23302	.03527	.28940	.17428
S	.00695	.00346	.04473	.01407	.03637	.02247
t	*1.99	.25	**5.21	*2.51	*7.96	**7.75

See footnotes at end of table.

TABLE 3 (Continued)

DEP. VARS. / IND. VARS.	AN y=670.46 R^2=.645	AP y=325.19 R^2=.150	PNPO y=413.34 R^2=.279	PNP y=381.04 R^2=.369	PN y=264.34 R^2=	PP y=116.70 R^2=
Channel type: (VHF=1, dummy variable):						
B	61.61	−5.41	6.74	5.07	6.72	−1.65
S	14.55	14.52	11.82	10.27	8.34	6.04
t	**4.24	−.37	.57	.49	.81	−.27
CBS:						
B	225.29	2.21	82.63	82.04	70.80	11.24
S	14.06	14.04	11.43	9.92	8.06	5.83
t	**16.02	.16	**7.23	**8.27	**8.78	1.93
NBC:						
B	259.73	−18.51	−38.73	−46.78	67.01	−113.80
S	13.68	13.66	11.12	9.66	7.85	5.68
t	**18.99	−1.36	**−3.48	**−4.85	**8.54	**−20.25
Newspaper joint ownership:						
B	23.25	−16.15	6.16	12.78	5.63	7.15
S	14.85	14.82	12.07	10.48	8.52	6.16
t	1.57	−1.09	.51	1.22	.66	1.16

TABLE 3 (Continued)

DEP. VARS. / IND. VARS.	AN y=670.46 R^2=.645	AP y=325.19 R^2=.150	PNPO y=413.34 R^2=.279	PNP y=381.04 R^2=.369	PN y=264.34 R^2=	PP y=116.70 R^2=
Group ownership:						
B	−13.27	−3.35	−8.19	−2.78	−1.14	−1.64
S	11.41	11.40	9.28	8.06	6.55	4.74
t	−1.62	−.29	−.88	−.35	−.18	−.35
REY (X000) X=2,359.49:						
B	.01451	.01768	.01408	.01229	.00849	.00380
S	.00282	.00281	.00229	.00199	.00161	.00117
t	**5.15	**6.29	**6.15	**6.18	**5.26	**3.25
Number of commercial stations X=3.13:						
B	2.54	−.39	−2.45	−2.27	−.16	−2.11
S	2.37	2.36	1.92	1.67	1.36	.98
t	1.07	−.17	−1.28	−1.36	−.12	**−2.15
Total broadcast minutes:						
B	.12758	.01670	−.02119	.00641	.01362	−.00721
S	.01502	.01499	.01221	.01060	.00861	.00623
t	**8.50	**3.12	−1.74	.61	1.58	−1.16

**Significant at the 1 percent level.
*Significant at the 5 percent level.
N/S not significant (the explanatory power of this variable was so low that the computer did not include it in the analysis).
See table 2 for key to abbreviations.

APPENDIX D

TV Station Monopolies—Divestiture Required

City, State:	TV Call Letters
Alabama: Anniston	WHMA
Georgia: Albany	WALB
Iowa: Mason City	KGLO
Mississippi: Meridian[1]	WTOK
New York: Watertown	WWNY
Texas: Texarkana	KTAL
West Virginia: Bluefield	WHIS

[1]WHTV, a satellite of Tupelo station WTWV, provides city-grade coverage but has no studio in Meridian.

APPENDIX E

AM and FM Station Monopolies—Divestiture Required

City, State	AM call letters	FM call letters
Arkansas: Hope	KXAR	
Illinois:		
Effingham	WCRA	WCRA-FM
Macomb	WKAI	WKAI-FM
Kansas: Arkansas City	KSOK	
Michigan: Owosso	WOAP	WOAP-FM
Nebraska: Norfolk	WJAG	WJAG-FM
Ohio: Findlay	WFIN	WFIN-FM
Pennsylvania: DuBois	WCED	WCED-FM
Wisconsin:		
Janesville	WCLO	WJVL

[1099]

APPENDIX F

1. Section 73.35 of the Commission's Rules and Regulations is amended to read as follows:

§ 73.35 Multiple Ownership.

(a) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mV/m groundwave contours of the existing and proposed stations, computed in accordance with § 73.183 or § 73.186; or one or more television broadcast stations and the grant of such license will result in the predicted or measured 2 mV/m groundwave contour of the proposed station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted or measured 2 mV/m contour, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published.

(b) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any in-

terest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven standard broadcast stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980 to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations which place(s) a city-grade signal over the community during daytime hours. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

Note 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2.—In applying the provisions of paragraphs (a) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

Note 3.—Except as provided in Note 4 of this section, in applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

Note 4.—In applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 U.S.C. section 80a-3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated.

[1100] Note 5.—In calculating the percentage of ownership of voting stock under the provisions of Note 4, if an investment company directly or indirectly owns voting stock in a company which in

turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper as it owns of the outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company need not be considered under the 3-percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

Note 6.—In applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts need be considered only if such bank directly or indirectly owns 5 percent or more of the outstanding voting stock: *Provided,* The bank files a disclaimer of intent to control the management or policies of the broadcast or newspaper corporation. Holdings by banks shall be aggregated if the bank has any right to determine how the stock will be voted.

Note 7.—In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

Note 8.—Paragraph (a) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for increased power for Class IV stations; to applications for assignment of license or transfer of control filed in accordance with § 1.540 (b) or § 1.541 (b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled standard broadcast stations and if no new encompassment of communitities proscribed in paragraph (a) of this section as to commonly owned, operated, or controlled standard broadcast stations and television broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of standard broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of standard broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population

in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a) of this section will not apply to any application by a party who directly or indirectly owns, operates or controls a UHF television broadcast station where grant of such application would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled standard broadcast station or would result in the entire community of license of such UHF station being encompassed by the 2 mV/m contour of such standard broadcast station. Such community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled standard [1101] broadcast station and daily newspaper fall within the encompassing proscription of paragraph (a) of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

Note 9.—Paragraph (a) of this section will not be applied to cases involving television stations which

are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade A contour of which completely encompasses the community of license of a commonly owned, operated, or controlled standard broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such standard broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled standard and "non-satellite" television stations may not be transferred or assigned to a single person, group, or entity except as provided in Note 8.

Note 10.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

2. Section 73.240 of the Commission's Rules and Regulations is amended to read as follows:

§ 73.240 Multiple Ownership.

(a)(1) No license for an FM broadcast station shall be granted to any party (including all parties under

common control) if such party directly or indirectly owns, operates, or controls: one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 mV/m contours of the existing and proposed stations, computed in accordance with § 73.313; or one or more television broadcast stations and the grant of such license will result in the predicted 1 mV/m contour of the proposed station, computed in accordance with § 73.313, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted 1 mV/m contour, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published.

(2) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other FM broadcast station if the grant of such license would result in a concentration of control of FM broadcasting in a manner inconsistent with the public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other

competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven FM broadcast stations.

(b) Paragraphs (a) and (c) of this section are not applicable to non-commercial educational FM stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations which place(s) a city-grade signal over [1102] the community during daytime hours. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

Note 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2.—In applying the provisions of paragraphs (a)(1) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented

by ownership of voting stock of such corporations will be considered.

Note 3.—Except as provided in Note 4 of this section, in applying the provisions of paragraph (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

Note 4.—In applying the provisions of paragraphs (a)(1) and (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 U.S.C. section 80a-3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated.

Note 5.—In calculating the percentage of ownership of voting stock under the provisions of Note 4, if an investment company directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper, as it owns of the outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company need not be considered under the 3-percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

Note 6.—In applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts need be considered only if such bank directly or indirectly owns 5 percent or more of the outstanding voting stock: *Provided*, The bank files a disclaimer of intent to control the management or policies of the broadcast or newspaper corporation. Holdings by banks shall be aggregated if the bank has any right to determine how to stock will be voted.

Note 7.—In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

Note 8.–Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with § 1.540 (b) or § 1.541 (b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled FM broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled FM broadcast stations and television broadcast stations or daily newspapers would result. Said paragraph will [1103] apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of FM broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of FM broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a)(1) of this section will not apply to any application by a party who directly or indirectly owns, operates or controls a UHF television broadcast station where grant of such application would result in the Grade A contour of the UHF station

encompassing the entire community of license of a commonly owned, operated, or controlled FM broadcast station or would result in the entire community of license of such UHF station being encompassed by the 1 mV/m contour of such FM broadcast station. Such community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled FM broadcast station and daily newspaper fall within the encompassing proscription of sub-paragraph (a)(1) of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

Note 9.–Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite"

television station the Grade A contour of which completely encompasses the community of license of a commonly owned, operated or controlled FM broadcast station, or the community of license which is completely encompassed by the 1 mV/m contour of such a FM broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled FM and "non-satellite" television stations may not be transferred or assigned to a single person, group, or entity except as provided in Note 8.

Note 10.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

3. Section 73.636 of the Commission's Rules and Regulations is amended to read as follows:

§ 73.636 Multiple Ownership.

(a)(1) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684; or one or more standard broadcast stations and the grant of such license will result in the Grade A contour of the proposed station, computed in accordance with § 73.684, encompassing the entire community of

license of one of the standard broadcast stations, or will result in the predicted or measured 2 mV/m ground-wave contour(s) of the standard broadcast station(s), computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of the proposed stations, or one or more FM broadcast stations and the grant of such license will result in the Grade A contour of the proposed station, [1104] computed in accordance with § 73.684, encompassing the entire community of license of one of the FM broadcast stations, or will result in the predicted 1 mV/m contour(s) of the FM broadcast station(s), computed in accordance with § 73.313, encompassing the entire community of license of the proposed station; or a dily newspaper and the grant of such license will result in the Grade A contour, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other

competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band.

(b) Paragraphs (a) and (c) of this section are not applicable to noncommercial educational television stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial television station which places a city-grade signal over the community. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980.

Note 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2.—In applying the provisions of paragraphs (a)(1) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

Note 3.—Except as provided in Note 4 of this section, in applying the provisions of paragraphs (a)(1), (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

Note 4.—In applying the provisions of paragraphs (a)(1), (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 U.S.C. section 80a-3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated.

Note 5.—In calculating the percentage of ownership of voting stock under the provisions of Note 4, if an investment company directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper as it owns of the outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corpo-

rate daily newspaper, the holding of the investment company need not be considered under the 3-percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

[1105] Note 6.—In applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts need be considered only if such bank directly or indirectly owns 5 percent or more of the outstanding voting stock: *Provided,* The bank files a disclaimer of intent to control the management or policies of the broadcast or newspaper corporation. Holdings by banks shall be aggregated if the bank has any right to determine how the stock will be voted.

Note 7.—In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street name for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, the party having the right to determine how the stock will be considered to own it for the purposes of these rules.

Note 8.—Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not

apply to applications for assignment of license or transfer of control filed in accordance with § 1.540 (b) or § 1.541 (b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled television broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled television broadcast stations and standard or FM broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of television broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of television broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a)(1) of this section will not apply to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in Grade B overlap with another television broadcast station that was commonly owned, operated, or controlled as of September 30, 1964; or to any application concerning a UHF television broadcast station which would result in the Grade A contour of the UHF sta-

tion encompassing the entire community of license of a commonly owned, operated, or controlled standard or FM broadcast station or which would result in the entire community of license of such UHF station being encompassed by the 2 mV/m or 1 mV/m contours of such standard or FM broadcast stations, respectively. Such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, and daily newspaper fall within the encompassing proscription of subparagraph (a)(1) of this section, the station may not be assigned to a single person, group, or entity if the newspaper is being simultaneously sold to such single person, group or entity.

Note 9.—Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade B [1106] contour of which overlaps that of a

commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated or controlled daily newspaper or the community of license of a commonly owned, operated or controlled standard or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such a standard broadcast station or the 1 mV/m contour of such an FM station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled "non-satellite" television stations with Grade B overlap or such commonly owned, operated or controlled non-satellite television stations and standard or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 8. Nor shall any application for assignment or transfer concerning such non-satellite stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated or controlled newspaper is proposed to be transferred, except as provided in Note 8.

Note 10.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

APPENDIX G

Summary of Actions Taken

I. Previous Rules Continued in Effect

(a) *TV-radio combinations.* No divestiture of existing combinations is required. The present rules governing such combinations which were adopted in an earlier phase of this proceeding remain in effect. This means that a licensee of a VHF television station may not build or acquire a radio station(s) (AM, FM, or AM–FM) in the same market; and that the licensee of an AM station, an FM station, or an AM–FM combination may not build or acquire a VHF station in the same market. Although existing combinations are not required to divest, if the owner of a VHF-radio combination sells, he must sell the TV and the radio station(s) to different parties. Applications involving UHF TV stations and radio stations are handled on a case-by-case basis. VHF television stations and AM stations are considered to be in the same market if the Grade A contour of the TV station completely encompasses the community of license of the AM station, or if the 2 mV/m contour of the AM station completely encompasses the community of license of the TV station. A similar market concept holds for FM stations and TV stations except that the critical contour for the FM station is 1 mV/m.

(b) *AM–FM combinations.* Existing rules governing such combinations continue in effect. No divestiture is required. This means that the licensee of an AM station may build or acquire an FM station in the same market and vice versa. Moreover, such a

combination may be sold to a single party. The matter of whether the present rules governing duplication of programming by AM–FM combinations should be amended will be pursued in pending Docket No. 20016 (39 Fed. Reg. 14228 (1974)).

II. New Rules Adopted

(a) *Radio-newspaper combinations.* Divestiture is required by January 1, 1980, if the only daily newspaper of general circulation published in a community and the only radio station(s) placing a city-grade signal over the entire community in daytime hours are under common ownership. The owner of such a newspaper-AM–FM combination may satisfy the divestiture requirement by selling the newspaper, the AM–FM, the AM, or the FM. Waivers will be granted on a proper showing. The formation of new radio-newspaper combinations in the same market is barred. They are considered to be in the same market if the 2 mV/m [1107] contour of an AM station or the 1 mV/m contour of an FM station completely encompasses the community in which the newspaper is published. If an existing radio station licensee acquires a daily newspaper in the same market, he is given until the date of expiration of license of the radio station, or one year, whichever is longer, in which to divest of one of the two properties. Newspaper-radio combinations which are in the same market but which do not fall within the divestiture requirement previously mentioned need not divest. However, if such combinations are sold the newspaper and the radio station(s) must be sold to different parties.

(b) *TV-newspaper combinations.* Divestiture is required by January 1, 1980, if the only daily newspaper of general circulation published in a community and the only TV station placing a city-grade signal over the entire community are under common ownership. The divestiture requirement may be satisfied by selling either the newspaper or the TV station. The divestiture requirement applies whether the TV station is UHF or VHF. Waivers will be granted on a proper showing. The formation of new TV-newspaper combinations in the same market is barred. (The proscription against formation of new TV-newspaper combinations applies whether the TV station is UHF or VHF.) They are considered to be in the same market if the Grade A contour of the TV station completely encompasses the community in which the newspaper is published. If an existing TV licensee acquires a daily newspaper in the same market, he is given until the date of expiration of the TV license, or one year, whichever is longer, in which to divest. Newspaper-TV combinations which are in the same market but which do not fall within the divestiture requirement previously mentioned need not divest. However, if such combinations are sold the newspaper and the TV station must be sold to different parties.

III. Policy as to Cross-Interests in Newspaper-Broadcast Combinations

The policy heretofore applied to cross-interests in broadcast stations serving substantially the same area will be applied to newspaper-broadcast combinations falling within the ambit of the newly adopted rules.

Concurring Statement of Commissioner Robert E. Lee

I have previously articulated my views with respect to cross-ownership of newspaper and TV—a breakdown of these combinations would, in my opinion, result in the demise of many newspapers throughout the United States. I recall with sadness the death of the *Boston Herald* newspaper after the Commission divested its wholly owned subsidiary, TV station WHDH.

However, I am concurring in the Commission's decision today because the rules are primarily prospective in nature and because, based on my prior experience, the Commission should give little weight to this issue in a comparative hearing against an existing TV licensee. As the Commission stated (at paragraph 129) any overall restructuring of the industry it deemed necessary has been done in this docket. To permit restructuring at renewal time would permit to be done indirectly what the Commission has refused to do directly. In addition, I will have the opportunity to analyze and evaluate future waiver requests of the Commission's rules on a case-by-case basis.

Now, with respect to AM/FM combinations, I believe it is economically premature to break them up at this point in time. Over these many years, the Commission has encouraged these combinations in order to support and promote FM development. The day may well come when AM and FM licensees can economically survive as separate entities. At that point, I, of course, will review my present position.

[1108] Concurring Statement of Commissioner Charlotte T. Reid

(Re Docket 18110)

Today the Commission makes a far reaching decision in its Telecommunications Policy. A decision requiring divestiture of cross-owned newspaper-television and radio stations. I have reluctantly concurred with the majority's decision to require divestiture of sixteen (16) such combinations by January 1, 1980, because of what I feel to have been a long history of service by many of these newspaper/broadcast combinations. Many of these could not have existed except for cross-ownership and I find it somewhat difficult to require such drastic action. However, it does appear that these sixteen (16) are exceptional cases and therefore distinguishable from other situations. Additionally, the affected parties still have the opportunity to seek waivers of our divestiture requirement.

I am certain that this will not be the last that we hear of this issue, either before the Commission or in the Courts.

Statement of Commissioner Benjamin L. Hooks Concurring in Part; Dissenting in Part

(In Re Multiple Ownership of Broadcast Stations –Docket 18110)

The litigious history of the issue of newspaper/broadcast cross-ownership outlined in the first twenty-three paragraphs of the majority opinion, the mammoth record amassed in this Docket, and the Commission's continuing antipathy toward media concentrations as well as its espoused penchant for diversification bear tangible witness to the complexity of this matter.

My own considerations have been fraught with attempts to apply generally accepted wisdoms to the problem. In so doing, I have been frustrated because, when applied to the question of newspaper/broadcast cross-ownership, many of these "wisdoms" conflict and appear to dictate opposite results.

For example, the maxim that "two heads are better than one" can be applied to the Supreme Court logic in attempting to achieve "the widest possible dissemination of information from diverse and antagonistic sources". *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945). Equally. I accord with the Commission's policy of promoting diversification of mass communications as "a factor of primary significance since . . . it constitutes a primary objective in the licensing scheme." *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 394 (1965). We should, I believe, continually endeavor to encourage a proliferation of information and entertainment sources as necessary for the enrichment and enlightenment of a pluralistic society with broadly diffuse interests. On the cross-ownership question in particular, there is the vigorous contention of Professor Stephen Barnett of the University of California, Berkeley, Law School that "there is a considerable amount of concrete evidence of harm from crossownership—consisting mainly of examples found in a variety of published, [1109] reliable sources—which in its aggregate demonstrates not only substantial and widespread harm but a clear tendency to produce it."[1] Professor Barnett's

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[1] S. R. Barnett, "Cross-Ownership of Mass Media in the Same City. A Report to the John and Mary R. Markle Foundation. *A Critique of, and Supplement to, the Prospective Reports of the Rand Corporation*" (September 23, 1974), at preface. In his report, Professor Barnett takes exception to

[footnote continued]

position is supported, in the main, by many other parties to this proceeding including the Department of Justice.

Conversely, as I contemplate the superior performance of many newspaper-owned stations (*see*, Dissenting Statement of Commissioner Nicholas Johnson, "Broadcasting in America: The Performance of Network Affiliates in the Top 50 Markets", 42 FCC 2d 3 (1973)[2]) and speculate on the performance of some unknown successor, my conditioned response yields "a bird in the hand is worth two in the bush" philosophy. Opponents ask: Why require divestiture for its own sake of a superior broadcaster, with experience, background and resources, for an unknown licensee whose operation may be inferior? Can we afford, through wide-scale divestiture, to experiment with a dogmatic diversity formula; and, after the churning has ceased, who will profit—the new owners or the

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two Rand Corporation studies (W. S. Baer, H. Geller, J. Grundfest & K. B. Posner. "Concentration of Mass Media Ownership: Assessing the State of Current Knowledge" [R–1584–NSF]. September, 1974 and W. S. Baer, H. Geller & J. A. Grundfest, "Newspaper-Television Cross Ownership: Options for Federal Action", August, 1974) which tend to conclude that there is a "lack of concrete evidence of harm from cross-ownership." The *Rand studies*, it seems, have determined that "the evidence on the effects of cross-media ownership supports neither allegations of substantial harm nor those of public benefits from newspaper-television combinations." *Barnett Study*, at preface.

[2]Although a harsh critic of "media barons," former Commissioner Nicholas Johnson, in his overall performance ranking (i.e., news, commentary, public service announcements, employment of minorities and women) of TV stations in the top fifty markets, rated newspaper owner licensees quite respectably compared to other individual and group stations. *See* Table 17 of *Johnson's Study*, 42 FCC 2d at 77 *et seq.*

public? The *Rand studies*, note 1, *supra*, suggest that newspaper ownership of stations has no effect, good or bad, whatsoever.

In the clash of these opposing pressures, I have sought the views of the judiciary which has weighed these elements before. The clearest and most fundamental precept which the Commission must heed is ". . . there is nothing in the Act [Communications Act of 1934, as amended, 47 U.S.C. 151, et seq.] which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a broadcast license." *Stahlman* v. *FCC*, 75 U.S. App. D.C. 176, 126 F. 2d, 124, 127 (1949). *Stahlman*, citing *Tri-State Broadcasting Co.* v. *FCC*, 68 U.S. App. D.C. 292, 96 F. 2d 564 (1938) went on about the Act to say: "It does not embrace and should not be extended by implication to embrace a ban on newspapers as such, for if that is the case, it would follow that the power to exclude exists as to schools and churches; . . . Hence, it is that in the present state of the law that a newspaper owner who is also the owner of a broadcast station may very well say to whomever challenges this dual right: "Who are thou that judgest another man's servant. To his own master he standeth or falleth.'" 75 U.S. App. D.C. at 179-80, 126 F. 2d at 127-28. Overwhelmingly, the attitude of the courts towards bare cross-ownership has been *nehil nequam est praesumendum* (nothing wicked is to be presumed)[3]. But, where cross-ownership is not "bare",

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[3]*See, also, Massachusetts Bay Telecasters, Inc.* v. *FCC*, 104 U.S. App. D.C. 226, 261 F. 2d 55 (1958); *Pinellas Broadcasting Co.* v. *FCC*, 97 U.S. App. D.C., 236, 230 F. 2d 204, *cert. denied*, 350 U.S. 1007 (1956); *McClatchy Broadcasting Co.* v. *FCC*, 99 U.S. App. D.C., 195, 239 F. 2d 15, *cert. denied sub nom., Sacramento Telecasters, Inc.* v. *McClatchy Broadcasting Co.*, 353 U.S. 918 (1957). *But cf., Lorain Journal Co.* v. *U.S.*, 342 U.S. 143 (1951).

where it is accompanied by other conditions such as a monopoly, cross-ownership can be a menace and affirmative action by the Commission is proper. *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959). The Commission has here required monopolies to divest and I agree with its decision in this respect. Where situations are extreme, we can and have acted (*see, e.g., Frontier Broadcasting Co.*, 21 FCC 2d 570 (1970)); and, should always do so where the circumstances present a spectre of specific abuse as in the *Mansfield Journal* case[4] or the great likelihood thereof. *See, Chronicle Broadcasting Co.*, 16 FCC 2d 882, 17 FCC 2d 245, *reconsideration denied*, 29 FCC 2d 903 (1969)).

Consequently, I am in favor of divestiture as a means of attaining necessary diversification because, as I have indicated, my philosophy favors the heterogeneity of voices that diversity should bring. That is the uniqueness and strength of this country. In my mind, then, the question is not one of divestiture, *per se*, but how that divestiture is accomplished and what conditions other than molopoly warrant *immediate* divestiture. Balancing inputs, I must concur with the majority's decision to the extent that it emphasizes a prospective means of attaining diversification rather than the harsh and unpredictable solution of divestments of an unprecedented scale. This Commission processed last calendar year 1,129 assignment and transfer applications out of some 8,600 existing stations in this country. Patently, there is flux and change in media ownership and the attritional process, governed by our future prohibitions, can provide a great deal of the desired diversification in a more orderly and

[4] *Mansfield Journal Co.* v. *FCC*, 18 F. 2d 28 (D.C. Cir. 1950) (refusing to grant Construction Permit for AM–FM because of competitive abuse).

equitable fashion than a wholesale upheaval. Nothing I have observed in this record or heard at oral argument warrants indiscriminate action. To mandate immediate divestiture in the less extreme situations, under the presently depressed economic conditions, would create undue hardships. I cannot find that justified when the same end may be accomplished, without the harsh and drastic dislocation, by our prospective policy.

Nevertheless, I cannot join my colleagues in limiting divestiture to pure monopoly instances while ignoring other situations where the problem could be as bad or worse. In confining divestiture to the thrust of dictum in the Supreme Court in *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959) (speaking on the point of absolute media monopolies), we have not paid proper heed to *Plains Radio Broadcasting Co.* v. *FCC*, 85 U.S. App. D.C. 48, 52, 175 F. 2d 359, 363 (1949) where the court held:

> It seems to us that in considering the public interest in the maintenance of competition in the dissemination of news, the Commission cannot select the fact that one applicant is the owner of the town's only newspaper and ignore the fact that the other applicant is directly related to several newspapers and radio stations in the same general section of the country (although not in the immediate community). *A concentration by a chain of stations over an area* would seem to us to be a factor in a comparative evaluation from the standpoint of competition in news dissemination. (Emphasis added).

[1111] As some of my past dissents have stressed[5], the regional concentration problem begs for further scrutiny

[5] *E.G., In Re: WEMJ, Laconia, New Hampshire.* (FCC Report No. 12757, No. 14, 1974).

by this agency. Informational sway over entire geographic regions, though not unadulterated monopolies, can have a much more adverse impact than a purely local exclusivity as the *Plains Radio* case notes. I wish, therefore, we had examined those situations more extensively in this Docket which is styled "multiple ownership of broadcast stations."

My principal dissent flows from our failure to use this proceeding in any way at all to deal with the question of minority ownership. The courts have told us, in *Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F. 2d 1201 (1971) and more recently in *TV9, Inc.*, v. *FCC*, U.S. App. D.C., , 495 F. 2d 929 (1973), *cert. denied,* U.S. , 95 S. Ct. 245 (1974), that the Commission must take steps to integrate minorities into broadcast ownership. While I am not naive enough to believe that even categorical divestiture, where swaps and stock transfers were the most likely result, would dramatically increase minority ownership, there are illustrations of locations where compulsory divestiture could have led to minority ownership. As stated at the July 24, 1974 Oral Argument by Kujaatele Kweli (National Black Media Coalition): "Guidelines must be developed which not only require divestiture, but which also increase diversity; otherwise new rules might only reorganize vested interests. Any new ruling must be conceived in the spirit of creating new opportunities for the previously deprived." Tr. at 153. Mr. Kweli recognizes, as do I, that naked divestiture of cross-owned stations, *simpliciter,* is unlikely to improve the minority position in broadcasting. In that connection, I believe the law allows us to facilitiate such minority acquisitions in cases where divestiture is required by tailoring the qualifications for assignees of divested stations to stress minority ownership. Just as we now have minimum requirements for all licensees (*i.e.*, legal, technical qualifications, financial and character qualifications), we could add a substantial minority ownership qualification without contravening Section 310 of the Communications Act. Section 310 merely prohibits us from considering the "disposal of the permit or license to a person other than [that] proposed" by the licensee, 47 U.S.C. § 310(b). It does not bar us from adopting general qualifications for all assignees or transferees; only from considering other parties not selected by the licensee who *first* meet our specified criteria. A more complete discussion of this concept is stated in a pleading in this Docket fied by Citizens Communications Center on behalf of the National Black Media Coalition (*Letter to Chairman Richard Wiley*, September 9, 1974). While I do not here subscribe to all of the proposals set forth therein, I believe the Commission should have devoted more attention to the proposal and dissent from its neglect to, at least, offer a meaningful alternative to accomplish some minority ownership of the divested properties.

Finally, I am not in concert with the majority insofar as our document does not specify the separation of operations between those [1112] newspaper/broadcasters untouched by our policy announced herein. I associate myself, therefore, with the views of Commissioner Quello on this point set forth in his concurring statement. More specifically, I am in favor of the program proferred by Marcus Cohn, Esq., embodied in a letter of July 26, 1974, to the Broadcast Bureau which specifies as follows:

(1) Separate sales staffs; competitive solicitation of all advertisers; (2) No combination or interrelationship of advertising rates; (3) Separate editorial and reportorial staffs; (4) No discriminatory policies or advertising rates

to media competitors; (5) Cross-ownership licensing not be permitted, unless their related newspaper—(a) carries fair program listing of TV stations; (b) accepts, on a non-discriminating basis, advertising from all broadcasting stations; and (c) licensee and newspaper has not discriminatory policy against advertisers who use competitive media.

Inasmuch as we are not mandating divestiture of all co-located media, and in view of the abuses alleged by Professor Barnett, the National Black Media Coalition, and others, we should have taken the course recommended by Mr. Cohn to assure that the asserted wrongdoing does not recur.

Statement of Commissioner James H. Quello

(Docket No. 18110)

While I am in substantial agreement with the philosophy as well as the result of this Second Report and Order, and have voted to support it, I question whether it goes far enough in one important respect. The operational separation of commonly owned newspaper-television and newspaper-radio combinations is, in my opinion, a vital element in assuring the Commission's long-held policy of diversity of voices and equitable business competition without forcing the harsh remedy of requiring general divestiture. The Commission's views on this issue are expressed in paragraph 132 of this document and I subscribe to the language in that paragraph. However, I firmly believe that this view should be expressed as Commission policy, at the very least, and as a rule if First Amendment considerations permit it.

My own view is that, absent affirmative effort to assure operational separation on the part of "combination"

licensees, the Commission must exercise extreme vigilance on a case-by-case basis and, should there be evidence of widespread abuse, re-visit this entire matter.

Concurring Statement of Commissioner Abbott Washburn

(On Newspaper-Broadcasting Cross-Ownership Decision—January 28, 1975)

I have serious reservations about one facet of the decision in this proceeding, namely, the divestiture requirement involving newspaper-radio combinations in nine small markets. In my judgment none of these situations amounts to an undue concentration of local "opinion power" akin to the newspaper-television monopoly cross-ownerships. But my chief concern stems from the possible economic disruption which our action may inflict on the small communities involved, particularly [1113] on those seven with populations under 20,000. I hope, therefore, that our waiver policy in these situations will take careful note of the possible harm to a community that could result from the forcing of a small daily newspaper out of business, or from the forcing of a small daily newspaper to become a weekly newspaper, and from the breaking up of an AM–FM radio combination where the FM is dependent upon the AM financially and/or provides the only local night-time service. In my view we ought, also, to give special consideration where the Commission's allocation rules prohibit another local radio station from coming into existence in these communities.

Statement of Commissioner Clen O. Robinson Concurring in Part and Dissenting in Part

The FCC does have a responsibility promote diversification of ownership and competition among communica-

tions media, as the Commission recognizes by today's Report and Order. My colleagues and I part company not over whether that responsibility exists, but over its scope and its implementation. As a matter of practical effect the Commission's decision is essentially limited to a few cases of literal monopoly, inasmuch as those are the only cases in which it is willing to require divestiture. Although future cross ownerships are banned in all markets, I believe a prospective ban is of little significance.

My version of what best serves the public interest would forbid, and require the divestiture of, commonly owned media (either newspaper or station could, of course, be divested) in all heavily concentrated markets, which are not confined to those in which the co-owned media constitute a literal monopoly. I would apply the same standard of undue concentration for divestiture as for a ban. For both I would apply essentially the standards developed in antitrust law—which, *conservatively interpreted*, would require divestiture in cases where the station and newspaper together controlled at least 30 percent of their respective markets. I would acknowledge the possibility of waivers in extraordinary cases, but I would emphasize that such waivers would be granted only on a most compelling showing of special considerations. With respect to radio-newspaper ownerships, I am less concerned about the dangers of concentration, but I would adopt the same standard of concentration as in the case of television-newspaper cross ownerships. I would deal in the same way with aural-television station combinations, which are at least still nominally before us in this proceeding.[1] Because my pre-eminent concern is

[1] The 1970 rules did not, of course, require divestiture of aural-television combinations but our Further Notice of

[footnote continued]

with the newspaper-television cross ownerships and because the same basic policy considerations are, I believe, generally applicable to the other combinations, I shall focus principally on the newspaper-television combinations.

[1114] I. Competition as a Communications Policy

The majority ably expounds the general policy ground for our concern. While I concur in their general exposition I wish to add a few observations of my own.

It is not up to the FCC, of course, to enforce the antitrust laws as such: our mandate is the broader one of enforcing the public interest, convenience and necessity. *United States* v. *RCA*, 358 U.S. 334 (1959). Clearly, public interest, convenience and necessity includes concerns other than diversification.[2] Just as clearly, as the majority here states, diversity and related competitive concerns bear heavily on the public interest and must be

Proposed Rule Making; 22 F.C.C. 2d 339 (1970) did leave open the possibility of ordering divestiture. It should be noted that AM–FM combinations are also, nominally, before us even though the original ban on such combinations was modified. See *Multiple Ownership Rule*, 22 FCC 2d 309 (1970). In its 1974 Memorandum Opinion and Order setting oral argument in Docket 20016, 39 Fed. Reg. 9551 (March 12, 1974) the Commission indicated, however, that it would consider, as an alternative to an AM–FM ownership ban, tightening our AM–FM nonduplication rules. For the present time I am content with that alternative, without prejudice to the possibility of revisiting this issue at an appropriate time in the future.

[2] *Cf.*, *Carroll Broadcasting Co.* v. *FCC*, 258 F. 2d 440 (D.C. Cir. 1958) (competitive entry in broadcasting): *FCC* v. *RCA Communications Inc.*, 346 U.S. 86 (1953) (competitive entry of common carrier).

considered in connection with its ascertainment.[3] Such matters in a particular situation may even prove dispositive. *United States* v. *RCA*, 358 U.S. at 351-52. Our own decisions have reiterated these same principles. In fact, I had supposed this statement of principle too well established to require further statement here, but in light of arguments by the NAB and ANPA (among others) to the contrary, apparently that assumption was incorrect. Their arguments are several.

A. The "No Competition for Competition's Sake" Argument

Relying on *Hawaiian Telephone Co.* v. *FCC*, 498 F. 2d 771 (D.C. Cir. 1974), and *FCC* v. *RCA Communications Inc.*, 346 U.S. 86 (1953), both ANPA and NAB have argued that "competition for the sake of competition" is indefensible; and that, before we go about promoting competition, we must affirmatively find that the public interest will be served thereby. Reliance on both decisions is misplaced inasmuch as both dealt with common carrier regulation of so-called "natural monopolies." Where natural monopoly is concerned, the received wisdom has been that competition has a limited role and that there is therefore no general presumption in its favor.[4] However, in the broadcast field that is not the received wisdom. More important, it is not the law. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 105-110 (1973); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

[3] *E.G., Joseph* v. *FCC*, 404 F. 2d 207 (D.C. Cir. 1968); *Clarksburg Publishing Co.* v. *FCC*, 225 F. 2d 511 (D.C. Cir. 1955); *Mansfield Journal Co.* v. *FCC*, 180 F. 2d 28 (D.C. Cir. 1950): *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *NBC* v. *United States*, 319 U.S. 190, 222-24 (1942).

[4] This wisdom is not received by everyone; see, *e.g.*, Posner. *Natural Monopoly and Its Regulation*. 21 Stanf. L. Rev. 548 (1969); Demsetz. *Why Regulate Utilities*, 11 J. of Law & Econ. 55 (1963). The FCC too has in recent years rejected some of the conventional wisdom about the supposed incompatibility of competition and common carrier regulation, and has come increasingly to recognize the important role of competition even in closely regulated areas traditionally regarded as the sole province of natural monopolies. See, *e.g., Specialized Common Carrier Services*, 29 FCC 2d 870 (1971): aff'd. F. 2d (9th Cir., Jan. 20, 1975); *Domestic Communications-Satellite Facilities*, 35 FCC 2d 844 (1972).

[footnote continued]

I acknowledge that if our deconcentration policy were premised solely on promoting competition in commercial advertising in local markets, we would have to give more studied thought to the argument raised by the NAB and ANPA. While I recognize that competition in advertising markets is an entirely proper aim of public policy, I also acknowledge that in radio and television advertising markets, competition is not an unalloyed benefit. A short digression into the economic [1115] effects of concentration (or, conversely, competition), will illustrate the nature of the problem.

The standard economic rationale for market deconcentration derives from the hypothesis that concentrated markets provide the opportunity for sellers to restrict output and to raise the price of their goods or services.[5]

[5] A number of empirical studies have attempted to measure the relationship between concentration and profit margins; the findings differ. Of those studies finding a positive relationship between concentration and high profit margins, the pioneering study is Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing*, 1936-1940, 65 Q. J. Econ. 293 (1951). Later studies include, for

[footnote continued]

As a result, resources migrate from these markets to other markets in which they contribute less to the common good. In short, concentration distorts efficient resource allocation. See, generally, F. Scherer, *Industrial Market Structure and Economic Performance, ch.* 17 (1970). Application of this theory to television advertising would lead one to expect a similar effect on local-market concentration upon advertising rates, and correspondingly on "proper" resource allocation. Though no conclusive result emerges from the comments filed in this proceeding,[6] we can assume for the sake of argument that there

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example, Mann, *Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries*, 1950-1960, 48 Rev. Econ. & Stat. 296 (1966); Collins and Preston, *Concentration and Price-Cost Margins in Food Manufacturing Industries*, 14 J. Ind. Econ. 226 (1966). The significance of these studies has been questioned, primarily on the ground that there has been no showing of a persistence of high rates of return in highly concentrated industries. It has been argued that the studies do not provide a basis for the recommendations of the 1968 White House Task Force on Antitrust Policy for a program to reduce concentration through divestiture. Brozen, *The Antitrust Task Force Deconcentration Recommendations*, 13 J. Law & Econ. 279 (1970). However, the studies, and the White House Task Force recommendations based in part on them have been defended by economist members of the Task Force. MacAvoy, McKie and Preston, *High and Stable Concentration Levels, Profitability, and Public Policy: A Response*, 13 J. Law & Econ. 493 (1971). For more recent analyses, compare L. Weiss, *Concentration-Profits Relationship and Anti-Trust* (unpublished manuscript, 1973) (concentration-profits relationship exists) with H. Demsetz, *The Market Concentration Doctrine* (1973) (no such relationship exists).

[6]Compare J. Rosse, B. Owen and D. Grey, *Economic Issues in Joint Ownership of Newspaper and TV Media*, Stanford U. Research Center in Economic Growth, memo. No. 97 (June, 1970) (finding correlation between newspaper ownership and higher rates), with A. Lago and D. Osborne. *A*

[footnote continued]

is a direct relationship between concentration, appropriately defined, and advertising rates.

The standard economic argument that attempts to connect competition and economic welfare through the price mechanism may not be sufficient to allow us to make policy judgments concerning television advertising.[7] If concentration in local advertising markets conveys monopoly power, this power would be reflected in the broadcaster's ability to restrict viewer hours of advertising messages in order to raise the price per viewer exposure. This effect could be accomplished either through a decision to offer fewer commercial interruptions in entertainment programming or to air programs with less mass appeal. The former reduction we might applaud. The latter we might deplore—unless it reflected the substitution of "public service" programming [1116] for more-popular syndicated or network fare. The broadcaster with monopoly power is surely freer—and might well be more inclined—to preempt a network motion picture in order to offer a detailed investigation of a local sewer scandal.

Quantitative Analysis of the Price Effects of Joint Mass Communication Media Ownership (NAB Study, March, 1971) (finding no correlation between newspaper ownership and rates). These two studies differ not only in their findings but in their statistical methodology. In the absence of fuller information about the models used, neither study can be accepted as definitive. One flaw of both studies, however, is their reliance on a measure of advertising price which is irrelevant to most television stations.

[7]The role of advertising in economic welfare generally is a controversial one on which there is a wide spectrum of divergent views. See G. Robinson and E. Gellhorn, *The Administrative Process*, 362-370 (1974) for a variety of critical perspectives on the virtues and vices of advertising. A useful general survey and analysis of the economic consequences is contained in F. Scherer, *Industrial Market Structure and Economic Performance*, ch. 14 (1970).

Thus, market power may be consistent with our desire to stimulate the public-service responsibility of broadcasters. Indeed, if there were not *some* barriers to competition in local markets, I suppose we could not expect licensees to offer the nonremunerative programs which are part of their public service responsibility. See *Carroll Broadcasting Co.* v. *FCC*, 258 F. 2d 240 (D.C. Cir. 1958); *cf.*, Levin, *Federal Control of Entry in the Broadcasting Industry*, 5 J. Law & Econ, 49, 61 (1962). These benefits from the exercise of market power in broadcasting must be candidly acknowledged as possible partial offsets against the potentially greater economic efficiency in the allocation of resources which increased competition can be expected to stimulate.[8]

If the desirability of competition here turned simply on assigning values to the foregoing economic considerations and weighing the resulting numbres against one another, I might be hesitant to say that the public interest demanded stricter control of concentration. However, an additional consideration must be placed in the scales: competition is a means of enhancing the potential for diversity of news and opinions[9] available to

[8]This is not to say that the public service benefits received are, in fact, commensurate with their economic costs—a matter on which there is at least ground for doubt. It is also not to say that the internal subsidy is the only or the best method for obtaining public service benefits. See *e.g.*, Levin, *supra*, 5 J. Law & Econ. at 64-66.

[9]Inasmuch as we are only concerned here with competition between broadcast stations and newspapers and not with new competitive entry into broadcasting, no account is taken of the benefits of competition in providing a new source of programming generally. But speaking of the general benefits of competition in the industry, this obvious benefit should be noted.

viewers, readers or listeners. The weight of this consideration seems to me decisive on whether increased competition in the advertising market is worthwhile. The dangers which concentrations pose to diversity of opinion seem to me sufficiently real to require the conclusion that a reduction in cross ownership in concentrated local markets serves the public interest whatever conclusions are reached concerning the effect of concentration on advertising rates or whatever judgment is reached about the economic effects of competition generally.

In so concluding, I have noted the argument of the NAB (among others) that we do not really need any additional diversity in the marketplace for ideas, that, indeed, we already have more diversity than we can handle. That assertion, buttressed in part by some interesting but irrelevant ruminations about "information overloads" and the like,[10] seems to me a feeble sophistry. Whatever the merits of these generalizations about how much information human beings can handle, nothing in them suggests that it is not a proper goal of public policy to continue to ensure that the information which the public receives and can absorb comes from diverse, competitive sources.

B. The "Wrong Forum" Argument

A number of opponents have urged that our mandate is to enforce the Communications Act, not the antitrust

[10]See NAB Comments, 29-36. Reliance is placed on a few paragraphs from A. Toffler, *Future Shock* (1970). Nothing in Toffler's observations—even granting their validity—suggests that diversification of mass-media control ought not to be of concern. Toffler merely holds that it is hard for someone to concentrate on one thing while being buffetted about in a hailstorm of facts. FCC Commissioners have special reason to know this is true. But it proves nothing in the realm of limiting diversity of speech.

laws: that two especially expert agencies of government—the FTC and the Department of Justice—are already attending to antitrust enforcement matters, and that our efforts in this regard, if not *ultra vires*, are at least supererogatory.

As always, we must be careful, as Justice Holmes once admonished, to think things rather than words. To be sure, the fact that we do not enforce the antitrust laws per se shows that we are not *required* to apply specific antitrust criteria in measuring the adequacy of competition in any given case, as if the relationship between competition and the public interest were apodictic. *Cf.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944); *Seaboard Airline RR* v. *United States*, 382 U.S. 154 (1965). But we are hardly barred from concluding that competition is what the public interest requires, and sound public policy does, in my judgment, require such a conclusion. Making anything of substance turn on the distinction between "antitrust standards" on the one hand, and a more general "public interest" standard on the other, obscures issues with labels. In plain fact, we have long held that antitrust concerns are important components of the public interest and we are entitled, if not obliged, to consider them here. See, *e.g.*, *United States* v. *RCA*, *supra;* see generally, Bennett, *Media Concentration and the FCC: Focusing With a Section Seven Lens*, 66 Nw. U.L. Rev. 159, 165 (1971).

C. The "Ad Hoc Approach" Argument

In opposition to divestiture, ownership interests in the communications industry argue that we need not and should not adopt an approach toward cross-ownership which relies on the creation of favorable market structures for competition. Rather, it is urged, we ought to confine our concern to cases where combined owner-

ship has been shown to have produced actual abuses. Adequate machinery—such as the Fairness Doctrine—exists, it is submitted, to prevent the worst consequence of economic concentration from ever occurring; and other machinery, such as antitrust enforcement, is sufficient to deal with competitive misconduct as it moves from potentiality to actuality. Furthermore, we have (it is urged) power to control actual abuses by promulgating rules of good practice or fair dealing designed to ensure that the power of combination is not abused, and, where clear abuse is shown, to order divestiture ourselves.[11]

This argument partly claims that we do not have power to structure the communications industry to suit what we conceive the public interest to require, and it partly claims that the public interest does not, in fact require "structural" rather than "behavioral" rules concerning competition.[12] We may leave the claim concerning the merits [1118] to the next section, and concentrate here on the legal part of the assertion. It is so frail as barely to survive exposition; even the most zealous of the non-interventionists concedes that we have a proper role where a literal monopoly controls the news outlets in a given market. If our jurisdiction to use the divesti-

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[11] *Frontier Broadcasting Co.*, 27 FCC 2d 486 (1971) is cited as precedent. After the Commission set a renewal application for hearing on an issue of concentration of control, the co-owned station was voluntarily sold.

[12] I use the terms "structural" and "behavioral" to denote two different approaches to the promotion of media diversity. The structural approach looks toward promoting a market conformation hospitable to diversity and competition; the behavioral approach relies on regulatory standards to enforce norms of competitive conduct, chiefly by prohibiting certain sorts of abuses that commonly accompany concentrated ownership and control.

ture remedy in monopoly markets is conceded, it is inconceivable that we should not have discretion to apply structural remedies where market power may be exercised by a less-than-monopoly concern. The question is: how much market power should be tolerated? Reasonable men may differ as to how that question should be answered, but it is difficult to gainsay that, in principle, the job of answering belongs to us.

Nothing about the divestiture remedy per se requires any exceptional comment or pause. In the related Clayton Act context, divestiture has long been viewed as a flexible and useful tool, not only to break up consummated monopolies, but merely to avert a trend toward an oligopolistic market structure. See, *e.g.*, *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966); *United States* v. *Alcoa*, 377 U.S. 271 (1964); and *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). Similar results have been reached where Section 1 of the Sherman Act was concerned, *United States* v. *First National Bank and Trust of Lexington*, 376 U.S. 665 (1964).

The foregoing discussion establishes that we have, at least in theory, a proper role in implementing so much of antitrust policy as seems to us consistent with our mandate to promote the use and utility of radio communications in the public interest. But it seems to me that our authority goes further. We may play that role by following a structural rather than a behavioral approach—that is, by prophylactic rather than reactive measures respecting competition and diversity.

Some commentators urge that we should not employ a structural approach—meaning divestiture in many cases—absent evidence of actual competitive abuses, that doing so would be arbitrary, discriminatory and unduly punishing. The proper response to this argument is to point to the structural rules which we already have—for example the duopoly rules, the multiple ownership rules, and the one-to-a-market rules, none of which are premised on any showing of an identifiable abuse. These rules, like the rule adopted by the Commission today, simply embody a judgment that concentration in relevant markets is an impediment to effective competition and diversity of viewpoints. I can discern little sense in the view that our means of enforcing desired norms of diversity must be chiefly by policing *ad libitum*. It is like insisting that the swamps not be drained so long as the quinine holds out.

D. The First Amendment Argument

Finally, the First Amendment is invoked as a reason why we may not adopt structural diversification rules. According to this argument, the First Amendment would be offended by a rule that "discriminates" against the owners of newspapers—i.e., that prohibited to newspaper owners a right permitted to other orderly citizens—the right to be a Commission licensee.

The short answer to this submission is that it is not newspaper owners that are being aimed at—it is monopolies or oligopolies: and [1119] these the First Amendment does not protect. Indeed, it may be argued that the First Amendment itself is against the creation and subsistence of such strong redoubts of economic and social power. See *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

II. Prudential Considerations

The preceding discussion is meant to dispose of the legal or jurisdictional objections to our meddling in media

cross-ownership. A number of additional arguments are addressed to our discretion rather than to our fundamental power. Several of these arguments deserve discussion before turning to considerations that suggest to me that the Commission's approach to cross-ownership is unnecessarily narrow.

A. The Fairness Doctrine

It is urged that oligopoly or monopoly in communications outlets, to the extent that they might seem to bottleneck the free flow of information to the public, need not be of concern to the Commission because the Fairness Doctrine will serve to assure that, in broadcast media at least, the public will receive reasonably balanced programming concerning controversial matters of public importance. It would be a serious mistake for us to rely on the Fairness Doctrine alone to serve the ends at which diversity aims.[13] What constitutes a controversial issue, what makes it public as distinct from private, or important as distinct from trivial, are concepts far too uncertainly anchored in consensus to be trusted to do the work of "a multitude of tongues." *Associated Press* v. *United States*, 52 F.Supp. 363, 372 (S.D. N.Y. 1943) (L. Hand, J.). We can rely on the Fairness Doctrine to keep a broadcast licensee in what it judges to be the mainstream of its community's mores, in a general, average way. But

[13] Indeed, as the broadcasters frequently remind us, the constitutional contours of the Fairness Doctrine are by no means certain, see *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974), and may not even be fixed, see *National Broadcasting Co., Inc.* v. *FCC*, No. 73-2256, D.C. Circuit. Sept. 27, 1974, vacated, Dec. 13, 1974 (*en banc*). It is odd, to say the least, to hear from an industry that has often stated its dislike for (and active opposition to) the Fairness Doctrine that we may rely on that doctrine to ensure diversity.

our apparent desire to encourage that result does not suggest, logically or as a practical matter, that we ought not to prefer that a community be exposed to as many such judgments as is feasible.

B. The "Newspapers Make Good Licensees" Argument

ANPA urges with great force that one of the best reasons on the merits for granting broadcast licenses to newspapers is simply that newspapers make superior licensees. They point to the track record of several newspaper-broadcasters to make their point. But their contention is beside the real point.[14] Deciding whether a licensee has [1120] been "good" or "bad," as we all know, is at the best a delicate job, and one that invites invidious, possibly even illegal government action. In order to avoid the temptation to introduce our personal predilections as significant determinants of licensee evaluation, we automate the normative functions as far as is practical. That is the meaning and advantage of structural rather than direct behavioral controls on the markets. All agree that

[14] It is also inconsistent in some sense with the assurances that newspapers and TV stations are operated separately. If they are truly separate operations, then how would newspaper ownership nurture quality in television broadcasting? Wherein lies the special virtue of a newspaper interest that is totally separated from the operation of the station? Pressed during oral argument for an explanation of this seeming contradiction the typical response of media owners was to fall back on general statements about the responsibility of newspapers, their keen awareness of local community needs and interests, etc. This explanation leaves something to be desired. What one wants to know is not whether newspapers are good citizens but how their special virtues as citizens are translated into broadcast operations that are, supposedly, independent of any working relationship with the newspaper.

competition in the arena of ideas is a good thing; I also assume that common ownership tends to erode competitive zeal. All agree that diversity of viewpoints is desirable; I also assume that common ownership tends to create an identity of outlook that can lessen diversity.[15] Similar assumptions have always governed the Commission's past action in this area. Suppose someone proposed to buy two television stations in the same market, pledging that both stations would continue (as before) to operate with separate staffs, separate editorial policies and separate identity. Could the Commission allow such a double-acquisition without patently abusing its authority? I think not, and I see no basis for a different judgment here.[16]

If we do not automate the judgment concerning what constitutes a "good" licensee—if we leave it to clinical, case-by-case judgments—there is some superficial force to the assertion that newspapers make superior licensees since some newspaper-owned stations have a reputation for being among the best stations in the country. But everyone should appreciate how very subjective and impressionistic the evaluation of such "reputation" evidence is.[17] It invites, I repeat, invidious if not illegal gov-

[15] The fact that the stations and newspapers operate with separate staffs is largely irrelevant if both staffs are selected so as to share a common outlook, or if the staffs—recognizing the fact of common ownership—come to act on the basis of shared interests.

[16] I do not mean to say that the foregoing hypothetical case settles whether there ought to be rules about separate ownership; but it does settle whether, once there are such rules, mere protestations and assurances concerning the propriety of waiving them ought to satisfy us.

[17] In fact, the argument is made, and supported with some more or less "soft" evidence (much of it in our own

[footnote continued]

ernment action, for there are simply no generally agreed-upon criteria that can be used to decide what constitutes a "good station." I do not think we can claim to have reliable, objective evidence that newspaper-owned stations are better than other stations.

The Commission, in passing, notes the results of a statistical study by our staff that found co-owned stations programmed more local news, and local non-entertainment programming, and more local programming generally, than independently-owned stations. (See Appendix C of the Commission's opinion.) On the other hand, similar studies by a leading economic scholar of communications (which have not been effectively rebutted) indicate no significant difference in news or public [1121] affairs programming, and no significant difference in the character or diversity of other program types.[18]

files), that many newspapers are far from the model licensees that they are made out to be. See Barnett, *Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary R. Markle Foundation* (memeo 1974). The evidence on this score is certainly not so overwhelming as to indict newspaper licensees as a class, but neither is it so negligible that it could be altogether ignored on the question of licensee "goodness"—*if* we really wanted to consider such matters in fixing our policy of diversification.

[18] Levin. *The Policy on Joint Ownership of Newspapers and Television: Some Assumptions, Objectives and Effects* (April 1971). See also Levin's clarifying memorandum of December 1971, and supplementary comments, May 1974. As summarized in the last submission. Levin's statistical analysis found the following:

I. Newspaper ownership does not affect:
   (a) The diversity of program types in the market.
   (b) Profitability.

[footnote continued]

Asking whether newspaper owners would provide more diversity among different program types is perhaps the wrong way to go about ascertaining whether such owners have a high "good quotient." We ought not to assume that the kind of "goodness" we really want in a station is measured simply by diversity among different program types, the relative percentage of situation comedies, news, public affairs and the like. On the other hand, it is about the only way we can get any kind of objective handle on program quality, without getting into the business of making subjective valuations of programming content, a course that, needless to say, raises grave First Amendment problems.

(c) Revenues.
(d) Time sales.
(e) Audience size.
(f) Amount of news.
(g) Amount of high-brow entertainment.
(h) Amount of low-brow entertainment.
(i) Amount of feature films.
(j) Amount of local programming.

II. Newspaper ownership has a very small positive effect on:

(a) The diversity of program types presented daily on the station ("vertical diversity") (i.e., less than one-tenth additional program type per day);

(b) Minutes of public affairs (plus 17 minutes per week).

However, these effects are much smaller than the effects of other variables.

III. In one-station VHF markets, newspaper ownership does not affect any of the above, except it has a small negative effect on:

(a) Amount of local programming (minus 135 minutes per week);

(b) Amount of non-network programming (minus 180 minutes per week).

This constitutional backdrop illustrates the principal difficulty with the whole character of the defense offered in support of newspaper-owned stations. We are asked to make a determination that these are "better" stations, but in the nature of things the only way one can really determine that is to make the kind of qualitative judgments that both the First Amendment and sound public policy would seem to forbid.[19]

C. The Risk of Nonpersuasion

No discussion of the merits of newspaper cross-ownership or divestiture can be complete without coping with the question of who bears the risk of non-persuasion. Ordinarily, as ANPA strongly urges, proponents of a change in the status quo have the burden of coming forward with evidence. In this case, I submit that the burden lies the other way. As a corollary to our belief that a comprehensive, unconcentrated ownership structure is prima facie in the public interest, it is up to the media owners to establish public interest tradeoffs sufficient to outweigh the assumed bad effects of concentration. The Commission need not attempt a detailed showing to prove precisely the [1122] vices of cross-ownership and each particular public interest benefit that may be expected to flow from divestiture. Once it is established that a

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[19] Even if we were to admit subjective judgments into consideration, it would have to be remembered that what we may deem to be high quality in newspaper ownership may reflect, not the fact that a newspaper owns the station, but other factors; the station may be "better" simply because of its network affiliation, or because it is in a major market with a large audience. This latter point bears special notice in view of the argument of combination owners, that co-owned stations and newspapers are managed and operated in *total* independence of each other.

given ownership structure is inadequately competitive—in other words, that it is concentrated to a degree that poses a significant possibility of uncompetitive behavior—the Commission's burden is at an end.[20] This allocation of burdens seems to me decisive of the basic question. I find nothing in the record to demonstrate that newspaper ownership of broadcast stations, in general, offers the public any distinctive benefits. Of course, in individual cases it may be that such a showing could be made. Such a showing—whether of unique public benefit or of extraordinary private hardship—could be handled with a waiver—a time-honored tradition of FCC rulemaking. Accordingly, we need not shy away from a general rule simply because its rigid application may create some public or private hardship. The remedies for such hardships are familiar and close at hand.

[20] In response to the submission of the Department of Justice that competition and diversity are presumed to benefit the public, the submission of one opponent—typical of the tenor if not the phraseology of most opponents, was that allocating the burdens so was tantamount to telling a homeowner that he must show why he should be permitted to retain his house. The analogy is arresting in that it illustrates how some broadcasters regard their licenses—as property. This view, to say no more of it, is simply at odds with our statute. To be sure, we do, as a practical matter, usually renew licenses indefinitely, a practice consistent enough to raise a certain informal equity in protecting investment and in rewarding service when and if it has been performed. But this informal equity should not be used to impede the erection of a framework within which that equity, and the expectations formed in reliance thereon, is constrained. Any contrary conclusion insulates the status quo from all competing claims of public interest as these may ripen in light of changing needs and changing perceptions of needs.

III. Measuring Concentration

A. Market Definition: Product Market

There is no exact science to the definition of line of commerce, or product market, as the Merger Guidelines of the Department of Justice (see 1 CCH TRade Reg. Rep. para. 4430) make very clear:[21]

> The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality and use. In this latter case, however, it may be necessary also to include in that market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality and use from the standpoint of that group of purchasers for whom the two products are equally interchangeable.

While a variety of subjective judgments are often required in determining whether products are substitutes

[21] A brief scan of the precedents likewise shows that the relevant criteria are far from concrete. Compare, for example, *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964) (glass and metal containers constitute single line of commerce); *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964) (copper and aluminum conductor are separate product lines). See generally, *Brown Shoe Company* v. *United States*, 370 U.S. 294 (1962).

and in drawing market boundaries, these judgments can be supplemented in most cases with empirical evidence. Do the prices of the goods appear to move together? Does an increase in the relative price of one good influence the demand for the others? Are the goods in fact interchangeable in [1123] terms of production or in consumers' consumption bundles? Unfortunately, this type of empirical evidence has not been assembled and analyzed in this proceeding.

In any event, it is important to distinguish between the two sets of "products" we consider here: (1) advertising and (2) the dissemination of news and opinions.

(1) The delineation of a product market for advertising is deceptively difficult. I believe that one must accept the notion that newspaper and television advertising are competitive services to some extent, but I must acknowledge the possibility that the cross elasticity of demand may not be large. For some products, they are obviously not good promotional substitutes while for others print may serve just as well as broadcast messages. I also concede that insofar as other forms of advertising are substitutes for print or broadcast messages, the advertising market includes other media which presumably offer some competition to newspapers and television stations. Having issued this caveat, however, I still stand by the conclusion that newspaper and broadcast advertising are sufficiently close substitutes to justify our regarding them, for purposes here, as the same "line of commerce."

(2) Delimiting the market for dissemination of news and opinion is equally problematical, but in this instance there are few empirical data to guide us. It is virtually impossible to determine the relative importance of various media upon local citizens' knowledge of contemporary

affairs. While it may be that especially well informed citizens draw their information from a wide variety of sources—daily newspapers, magazines, weekly newspapers, television, radio, and various professional newsletters—as a practical matter, it seems to me unlikely that most citizens avail themselves of the full variety of sources available. Such evidence as we have corroborates the intuition that television, newspaper and radio are the dominant sources of information.[22] On this conclusion I believe we are amply justified in striving for diversification of control of these media within the same geographic market.

B. Geographic Market

The above considerations argue for quite different approaches to the demarcation of geographical boundaries in defining the relevant market. For advertising, the important question is whether a given medium competes for exposure to audience (readers, viewers, or listeners) for promoting a particular group of products or services. The media in effective competition with one another in this respect may not be alternatives for disseminating news and opinions concerning local or regional matters. For both product markets, a number of alternatives are before us. One, argued by the NAB and endorsed by most of the media interests, is the so-called Area of Dominant Influence (ADI), employed by advertisers to define markets for purposes of advertising sales. A second, suggested by the Justice Department and others, is the Standard Metropolitan Statistical Area (for markets outside officially designated SMSA's, presumably something like Urbanized Area could [1124] be used). A third, which is

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[22] H. Litwin & W. Wroth, *The Effects of Common Ownership on Media Content and Influence* (1969).

suggested by some of our own prior precedents,[23] is the service contour of the co-owned station (Grade B, Grade A, or City Grade, or their radio counterparts, could be used—with widely divergent results). Each of these different approaches to market definition does have something to be said for and against it. But for present purposes the market area in which we are interested is not the area served by one or the other of the co-owned firms, but that area in which their service overlaps.[24]

For purposes of its prospective ban on newspaper-television cross-ownerships, the Commission implicitly[25] regards the Grade A service area of the co-owned

[23]The word "some" merits special emphasis for the Commission's precedent is far from clear and anything but consistent. The following is a short sample of recent decisions and criteria used as the principal determinant of market definition for the purpose of measuring concentration and diversity of media.

City of License-Frontier Broadcasting, 21 FCC 2d 570 (1970) (TV Renewal), *Gale Broadcasting Co.*, 15 P&F Radio Reg. 2d 337 (1969) (FM Sale).

City and Surrounding Area-Jonquil Broadcasting Co., 18 P&F Radio Reg. 2d 243 (1970) (AM Sale), *The Evening Star Broadcasting Co.*, 20 P&F Radio Reg. 2d 1311 (1971) and *Federation of Citizens Association-D.C.*, 17 P&F Radio Reg. 2d 1113 (1970) (TV Renewals).

Station Contour-Cumberland Gap Broadcasting Co., 24 FCC 2d 393 (1970) (FM CP),*KSOO-TV, Inc.*, 28 P&F Radio Reg. 2d 1271 (1973) (TV Sale).

[24]I stress this obvious point only because it seems to have been ignored by many of the advocates in this proceeding (most notably the NAB), who have argued in effect that the widest area served by the newspaper or station be used to measure competition and concentration.

[25]The point is somewhat obscured in the majority opinion. The Grade A contour is used to define "co-owned"

[footnote continued]

television station as the relevant geographic market for purposes of banning newspaper-television (comparable service areas are drawn for radio-newspaper) ownerships.[26] Following the majority's approach of banning all (future) common ownerships within the Grade A contour of the station, the use of a Grade A contour standard actually imposes a stricter standard—for purposes of a prospective ban—than would be suitable under an approach which uses the market concept as a framework for measuring concentration. The majority, in other words, uses the television/radio contours as the criterion for deciding in what area co-ownership ought to be banned. My view is that, since concentration of control is the evil to be eliminated, engineering contours without more will not necessarily yield the information we presumably want, and ought not be depended upon to do so. It might be acceptable to use the Grade A television service contour (or its aural equivalent) to describe a geographic area in which concentration would be measured; but this approach, in my view, would artifically dilute the concentration figures. I believe it much more realistic to measure concentration with reference to the city or urban area (or perhaps in larger cities, the SMSA) in which the co-owned facilities exist. However, I would then ban *existing* as

rather than to measure concentration. Under my approach the "market" is defined for purposes of measuring the degree of concentration. Incidentally, it should be noted that, while only television-newspaper markets are dealt with here, I am concerned with basic concepts and the same concepts are applicable, *mutatis mutandis*, to aural-newspaper ownerships, and also television-aural combinations.

[26]For purpose of divestiture the majority adopts a much different approach, one which is not based on any concept of market definition but simply on a restrictive view of what constitutes impermissible concentration.

well as future ownerships in such of those markets in which there was an "undue concentration" according to criteria described below.

C. Competitive Foreclosure: Determining the Threshold

My greatest difficulty with the majority is not with its approach to market definitions, but with its determination of the tolerable level of [1125] concentration for existing combinations. The majority's acceptance of a high level of concentration for existing stations is particularly disturbing given the rather remote possibilities for new entry into television broadcasting.

The Justice Department urges upon us the adoption of the Clayton Act Section 7 standard of illegality which is based upon numerical market shares and the trend in concentration. The highwater mark in Section 7 litigation was reached in *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), where the Court found a violation in a merger of two grocery chains which, between them, embraced but 7.5 percent of the relevant market. The Court's standard depends not only on the alarm with which it views trends towards increasing concentration in an industry; it is also conditioned on the possibility that new entrants can invade a market which has become noncompetitive. In local television and newspaper markets, concentration is not likely to decline much further, but new entry is equally unlikely. New television stations are obviously not likely to spring up in concentrated markets unless the Commission changes its allocations plan. Entry by new central-city newspapers is even more unlikely. Thus, we are dealing in an area in which concentration cannot be reduced by market forces unless it occurs through new entry in weekly newspapers, magazines, advertising/news circulars, or other less important advertising-information media.

Given the relative immutability of media concentration, the prudent approach is to adopt a rather strong standard for cross-ownership. I do not believe that we should imitate the antitrust case law by distinguishing between new combinations and older agglomerations of market power because we cannot presume that market forces will eventually lead to increased competition through new entry. Whether this standard should be based upon concentration ratios-computed on the basis of audience or advertising shares—or less precise data, the standard should be the same for divestiture and new cross-ownership and it should be sufficiently stringent to be at least consistent with earlier Commission decisions dealing with media concentration.

An examination of immediately relevant precedents in this area indicates that the Commission's administrative standards for judging competition or concentration have, at least until now, been more rigorous than the judicial standards noted above. In its earlier action in this docket the Commission prohibited common ownership of VHF television and aural stations regardless of the number of television or aural station competitors in the market. So also in its duopoly rules the Commission prohibited common ownership of television stations with overlapping Grade B contours—again irrespective of the number of competing stations in the market area. See 22 FCC 2d 306 (1970). In both these situations it is easy to imagine individual ownerships within the ban of the rule that would not meet, for example, the 30 percent foreclosure test in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

Obviously, application of these precedents here yields different results depending on the precedent chosen, the particular mode of measurement [1126] and so on. For

example, if the *Philadelphia Bank* standard of 30 percent foreclosure of the market is translated into station-audience/newspaper-circulation shares for the co-owned facilities within the "home city" (urban area in which both facilities are located), divestiture would be required in some 67 combination ownerships.[27] A *Von's Grocery* standard would require divestiture of all combinations. Reliance on our own past precedent in this area would suggest we ignore data on concentration ratios, whether measured by audience shares or other indicia of market strength, and simply ban all common ownership regardless of market shares. The majority has here adopted this latter standard—for future combinations only.

I could accept either the 30 percent concentration standard of *Philadelphia Bank* or a stricter, flat proscription of combinations in all markets, regardless of degree of concentration; the latter has the very substantial advantage of administrative convenience. What I cannot accept is the standard adopted by the majority for purposes of divestiture—that is, taking the worst cases of market concentration and distilling therefrom only those markets where the newspaper-owned station provides the only City-Grade television service.

For purposes of banning future acquisitions—including transfers of combined ownerships—the majority is prepared to find that the combination of newspaper and television stations within a prescribed service area of the

[27] This is based on prime-time audience shares for the television station and daily circulation shares for the newspaper. See Baer, Geller and Grundfest. *Newspaper-Television Cross Ownership: Options for Federal Action*, 14 (RAND 1974). The RAND study gives a useful analysis of various alternative criteria for measuring concentration and how it would affect the results.

station involves an impermissible degree of concentration. But it is unwilling to apply this standard to existing combinations. Instead, it adopts a standard requiring divestiture only where the city in which the combination exists receives only a single City Grade service (or comparable service for radio-newspaper situations)—in short, cases where there is a virtual monopoly of the relevant media. This is unacceptable to me. If divestiture is warranted at all—and I think it clearly is—I do not see how it can be confined to a bare handful of small markets in which there is monopoly. The fact that non-monopoly combination markets have a relatively more competitive structure should not obscure the fact—and the majority acknowledges it to be a fact—that the structure of these markets is *inadequately* competitive.

The inadequacy of the Commission's approach to divestiture is underscored by the fact that, in confining divestiture to a handful of small, monopoly situations, it is confining effective relief to markets where competition may prove, ultimately, to be unfeasible. Stations (or newspapers) in these small markets may be marginal operations with the least potential for sale at a reasonable price. Small market owners could well be the most attractive candidates for waivers in [1127] order to avoid, for example, undue financial hardship.[28] Indeed,

[28] I do not mean to imply that I would likely be moved by waiver requests. I am skeptical that many, if any, plausible cases for "hardship" waivers exist. But I do concede that the Commission should give a fair-minded hearing on a prima facie showing by an applicant that divestiture would be an unreasonable hardship or otherwise would not serve the public interest in a special case. Indeed the law requires that we allow for the possibility of waiver. *WAIT Radio* v. *FCC*, 418 F. 2d 1153 (D.C. Cir. 1969).

One especially sympathetic situation for a waiver might arise if a broadcaster decided to found a daily newspaper.

[footnote continued]

the majority appears to recognize as much—almost to the point of inviting waiver requests. Five years from now, I think we may find that no divestitures at all have taken place. I regard that as an inadequate solution to the serious concentration problem which the majority itself concedes to exist.

IV. The Case for Divestiture

It is true, of course, that a prospective ban conforms to Commission precedent in connection with the duopoly and television-aural combinations. However, what we have done in the past does not dispose of the merits of divestiture in this case. In broad terms, we have three issues before us which we must carefully consider: (1) the need for divestiture, (2) the effect of divestiture (herein the question of "equity"), and (3) the legal authority of the Commission to order it.

A. Need for Divestiture

The desirability of divestiture is made out simply by observing that, in the absence of divestiture, a rule banning cross-ownership of newspaper-television stations will mean very litt.e As NAB's advocate pointedly expressed it in oral argument: "a prospective ban would be purely academic." While I am loath to equate the term "academic" with "meaningless," I agree with his conclusion. I think it is quite plain that the real cause for concern is existing combinations, which will not soon dissolve themselves. With regard to prospective applications for new combinations, the number of such possible applications is too small to be worth troubling about. Certainly it is not worth four years of rulemaking deliberation.

One need not anticipate this circumstance frequently arising, but it is not impossible; see, *e.g.*, "Wichita Broadcaster, Countering Trend, Starts a Weekly Paper," New York Times, Oct. 29, 1974.

Nothing in the majority opinion effectively disputes either of these propositions. In most of the markets involving newspaper-television station ownerships the stations have been commonly owned since the time of original license. Very few of the common ownerships that have been created have been dissolved by transfer of control or assignment of license. In fact, the very point has been strongly urged as one of the singular virtues of such ownerships. We are told by opponents of the ban on common ownership that newspaper licensees offer stability because, among other things, they do not traffic in licenses. I am not persuaded that non-trafficking is a virtue to be accorded any great weight; our rules forbid trafficking in any case. Furthermore, it may be that the stability of newspaper ownership is simply [1128] a result of the fact that newspaper-owned stations are, on the whole, well-located and profitable. Besides, the very stability of ownership proves the point that we cannot realistically rely on future transfers to dissipate the concentration of ownership.[29] As for the second point, con-

[29] It is true that a number of combinations has been reduced somewhat in recent years, but one of these (WHDH-TV in Boston) was ordered by the Commission; another (KFBC-TV in Cheyenne) was influenced by threatened Commission divestirue (a hearing had been designated on the issue of concentration). In a third case, which is pending, it is apparent that the transfer is influenced by the desire to eliminate the need for FCC approval (and possible denial) of a merger between two large newspaper chains. Voluntary divestiture may also have been designed to soften possible Justice Department opposition to the merger. In a fourth case the elimination was the result of the failure of a UHF station in a marginal market. In other cases it is not known what factors may have influenced the elimination. However,

[footnote continued]

cerning possible future application by newspaper interests for stations which would fall within the scope of our rule, it suffices to observe that in the past decade the number of such applications has been negligible.[30]

B. Effects of Divestiture

The majority rejects the remedy of divestiture for newspaper-television station combinations in all but a very few cases of pure local monopoly. The reason they give for treading so lightly on existing combinations while enacting strict standards for prospective combinations is a professed fear of disrupting the "stability and continuity" of the local broadcasting service. This justification seems to me a makeweight; if it were not, I doubt whether the Commission would routinely approve the numerous transfers of broadcast licenses it passes on each year. If transfer of ownership is disruptive, *per se*, it should be no more disruptive when ordered by the Commission than when undertaken voluntarily by the licensee.

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some of these may have been influenced by the threat of forced divestiture as a result of the Commission's rulemaking proceeding and the Justice Department's vigorous opposition to renewal of newspaper owned stations in several major markets. In short, there is no reason to expect a continuation of this "trend"—if it can be called that—in voluntary separation of ownership. But even if it did continue, at a rate of, say, three per year (approximately the rate over the past four years if one discounts the above-mentioned special cases) it would not suffice. I do not think the public should have to wait 25 to 30 years to realize the benefits of competition—benefits which, we are all agreed, the public is entitled to. This is especially true when one considers that ultimate voluntary separation is not assured.

[30] As best I can ascertain—the Commission's records are not instructive on this point—there have been none since at least July 1970.

But, of course, as we all know, the mere transfer of ownership of a broadcast station or of any other business enterprise need not be accompanied by any disruption of its daily affairs. Management and operating personnel frequently remain with the enterprise, assuring a smooth transition. Indeed, any other action by the new licensee would only reduce the value of his franchise. Therefore, absent any contrary evidence, we have every reason to believe that even the most ambitious divestiture policy would have very little effect upon routine broadcast operations.

It is argued by opponents that a divestiture policy might actually undermine diversity because without the advantages of joint ownership, some stations, or some newspapers, might be forced into bankruptcy. Although the argument is sometimes expressed in terms of newspapers subsidizing marginal stations, the reality generally seems to be the other way—that newspapers are being subsidized by stations. Such was reportedly the case with Channel 5 in Boston, and such is allegedly [1129] the case in other markets as well.[31] To the extent that

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[31] For example, in Washington, D.C. broadcast holdings of Washington Star Communications are allegedly subsidizing the newspaper subsidiary, The Star-News. I use the terms "reportedly" and "allegedly" to underscore the fact that in neither case are the established facts sufficient to support definite conclusions that there is cross subsidization. In the Channel 5 case the fact that the co-owned newspaper (the Herald-Traveler) merged with another newspaper after the station (WHDH) failed to be renewed proves nothing, unless it is also shown that it would have continued if the co-owned station's license had been renewed. In the case of Washington Star, there is an allegation by the owners that the co-owned stations (AM-FM—TV) are necessary to support the newspaper (Applications to Transfer Control, BTC-7601), but we have yet to ascertain what the facts are.

this is the problem, I think the Commission ought to give slight weight to it, as a general matter, for several reasons.

First, we do not have any reliable information on the degree of cross subsidization and what would happen to current newspapers after divestiture. The fact is, however, that if the stations were sold at a reasonable profit, the profit could be re-invested in another enterprise which could support the paper as well as a broadcast station could. Why should cross subsidy—assuming it is a good thing (a temporary assumption to be examined momentarily)—only be achieved by operating a television station? If an owner wishes, for whatever motive, to subsidize an unprofitable newspaper, I see no reason why he could not do so just as well by taking the proceeds from the sale of the station, investing in some other lucrative enterprise, and using the resulting income to support the newspaper.[32]

Second, whatever the general public interest merits of subsidization of newspapers I do not think that this is, in itself, a proper concern of the FCC. That does not mean that we could not accept, as a reason for not re-

[32]The counter to this may be that no other such lucrative enterprise offers the same possibility for cross subsidization. There are two possible anchors to this speculation. One is that no other investment is quite so profitable as a television station, the other is that economies of scale permit special saving. If the first statement is true, however, it is irrelevant because the supra-normal profitability of the station would be capitalized in the sale price leaving the former owner with the same present-value of capital as before. The second statement would appear to be at odds with the owners' argument that stations and newspapers are separately managed and are, as news gathering and entertainment vehicles, genuinely unrelated.

quiring divestiture, a showing that the newspaper would fail were divestiture required. This "failing company" defense has been recognized in antitrust law since *International Shoe Co.* v. *FTC*, 280 U.S. 291, 302-303 (1930), and I am prepared to entertain it in an appropriate case. As a general proposition, however, I doubt that I would accept the failing company argument as an automatic and absolute defense in the case of broadcasting; I question the wisdom of encouraging the use of broadcast profits to support other, failing business, even newspapers.[33] However, in any event, I would accept the defense only on the limited conditions which have been imposed by the courts in antitrust decisions. The two major limitations, enunciated in *International Shoe* and adhered to by the courts since, are: (1) the [1130] resources of the acquired firm "are so depleted and the prospect of rehabilitation so remote" that the firm faces "the grave probability of a business failure"; (2) there is "no other

[33]Even assuming that it is appropriate public policy to subsidize newspapers, it is not at all clear that broadcast profits are better put to this purpose than to enriching the program offerings of the broadcast stations. Internal subsidization is hardly an unknown technique; it is familiar not only to the broadcast industry but throughout the regulated sector. See Posner, *Taxation by Regulation*, 2 Bell J. Econ. and Mgt. Science, 22 (1971). It would seem more efficient, however, and more in accord with *FCC* policy, to see that the subsidy is devoted to support unremunerative *broadcast* services, rather than newsprint services. As to the supposed benefit of supporting competition for the co-owned broadcast station, the question that needs to be asked is whether under these circumstances of co-ownership there is adequate competition. It is not a full answer to this question to say that this competition is better than none since subsidization of a failing newspaper may serve to retard new competitive entry—in some form—that may take the place of the old service.

prospective purchaser." *International Shoe Co., supra,* 280 U.S. at 302-303. See also, *e.g., Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 136-37 (1969).

In addition to the arguments that a divestiture policy might lessen diversity, the NAB has also argued that divestiture would disrupt station finances and that it would be unfair to investors who had put up money on the strength of the expectation that the property they had invested in would be left intact. Such arguments have very little weight. The proposed rule would not require the owner to forfeit its interest; the station would be sold—with the capital value of the franchise included in the sale price, or one station could perhaps be exchanged for another station. Even if the forced sale should return something less than the expected value, this should, I think, be of little concern. In most instances the facility will have returned the original investment to the owner several times.[34]

There is another argument that can be similarly dismissed—that because the large stations are so expensive, any forced divestiture would lead to large group owners coming into the local markets because they would be the only ones that would be able to afford the expense. This proposition I find most doubtful. The expensive

[34] For original licensees, this point seems quite obvious, especially in the concentrated markets with which we are most concerned. For licenses which have been recently acquired through transfer (and the franchise value thereby capitalized into the value of the station) there is some possibility that the current owner may not have fully recouped its investment. Even here, however, I am unwilling to assume that the public interest compels us to ratify the licensee's expectation that its three-year license constitutes a perpetuity which should not be revoked when other, and weighty, public interest considerations may require it.

large market stations would find little difficulty in attracting capital. Banks are happy to lend money to responsible entrepreneurs, especially those lucky enough to stumble on the opportunity to buy, for example, WTOP-TV; I do not believe we will have to wait for ITT to come along to make such a purchase. And, in any event, the FCC can condition the transfer upon approval of the future owner. It is true that, under Section 310 of the Communications Act, the Commission is forbidden to consider whether a transferee is the best among other possible candidates. But this prohibition does not deny the Commission the power to ensure that any transferee of the station meets the basic qualifications which are embedded in its general rules and any special conditions which it might create for the particular purpose of the transfer for the divestiture.[35]

C. Legal Authority for Divestiture

The argument has been made by some opponents of the rule that the FCC does not have authority to order

[35] I am not at all clear that it would be such a bad thing for new multiple owners to be attracted into television broadcasting—conceding, *arguendo*, that a divestiture policy would have this result. Whatever our policies may be respecting co-ownership, group ownership constitutes a bulwark—and to my mind a highly desirable one—against the economic power of the networks.

The contention that divestiture would cut against our policy of local ownership and bring in a new crop of non-local owners is far from impressive. The local ownership policy has never represented an especially strong preference of the Commission's. But even if it bulked large on our agenda of values, it would be difficult to swallow coming from its present proponents, considering the number of major market broadcast outlets that are owned by non-local newspaper chains.

divestiture of existing ownerships, [1131] in absence of specific statutory authority—even if such ownerships were found to be in present violation of an FCC rule. This argument rests on the mistaken premise that every particular aspect of our authority must be traced to some clear statutory term. If any such an assumption could have survived *NBC* v. *United States*, it clearly gave up the ghost with *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

I do not wish to overstate the FCC's authority; in fact, it is not necessary even to concede the expansive powers suggested in *NBC* and affirmed in *Southwestern Cable* to sustain the action here. That we have the basic authority to promulgate rules of this general character cannot be reasonably disputed. On the question of our general rulemaking power, *Storer Broadcasting Co.* v. *United States*, 351 U.S. 192 (1956) is dispositive. On the question of agency power to enact rules and enforce them retroactively against existing license interests, *American Airlines, Inc.* v. *CAB*, 359 F. 2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966), affirmed just such a power. See also *WBEN, Inc.* v. *United States*, 396 F. 2d 601 (2nd Cir.), *cert. den.*, 393 U.S. 914 (1968). Authority in the present case follows *a fortiori* from these precedents in light of the fact that the interest in a broadcast license is limited and conditional. It is subject to application for renewal at the end of a three year term and the renewal application is subject to such rules and conditions as are in effect, not during the license period, but at the time of the renewal. *Transcontinent Television Corp.* 308 F. 2d 339 (D.C. Cir. 1962).[36]

[36] Concededly, an interest in reasonable flexibility and fairness in adjusting general rules to individual cases dictates [footnote continued]

Opponents of the rule have attempted to make divestiture something special, a distinctive remedy requiring specifically granted authority. But, on the contrary, divestiture here is nothing more than the consequence of an immediate application of a general regulation declaring a public interest term on which licenses shall be permitted to operate. The effect here is identical to the effect given the rule in *American Airlines.* It is also identical to the effect of the rule in *Transcontinent* given the fact that the divestiture here is to take effect only after a future period that exceeds any present license period. By way of conclusion, one general observation: it is very important that it be recognized that this proceeding, and the concerns underlying it, results in significant part from our own previous decisions in allocating the broadcast spectrum. The Commission's objective of stimulating localism required that television frequencies be dispersed as they are—and the result has been that most television markets are highly concentrated.[37] In a very real sense, the fact that Cleveland has only three VHF stations makes similar concentration in Kansas City inevitable. The only way additional television stations could [1132] possibly get enough advertising revenues to survive would

that we leave open the possibility for waiver. That is assumed with all our rules. See *Storer Broadcasting, supra; WAIT Radio* v. *FCC*, 418 F. 2d 1153 (D.C. Cir. 1969). Nothing we do here precludes us from considering pleas for individual, special treatment, where it can be shown to be necessary. But the possibility of special dispensation to serve the needs of equity does not undermine our power to make general findings of public interest and apply them generally without individualized proceedings.

[37] For a general critique of localism and an attempt to assess its costs in terms of foregone diversity and additional services, see R. Noll, M. Peck and J. McGowan, *Economic Aspects of Television*, ch. 4 (1973).

be for new networks to form, a development which is made impossible by the absence of a fourth or fifth equivalent frequency assignment in most markets. Thus, Commission policies themselves must bear a large portion of the blame for local market media concentration. I do not say that important benefits do not result from this policy of localism. But there are certainly substantial costs in terms of foregone potential for greater diversity. The fact that we adhere to a local allocations policy does not undercut the case for completion and diversity; it rather underscores the high importance of adopting all feasible measures to offset the limitations which a localism policy imposes on competition and diversity. The present proceeding seeks to do this in a modest way. I regret that the Commission has not gone further, by requiring general divestiture.

[53 F.C.C.2d 589]

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of Amendment of Section 73.34, 73.240, and 73.636 Of The Commission's Rules Relating To Multiple Ownership Of Standard, FM and Television Broadcast Stations	)))))	Docket No. 18110

MEMORANDUM OPINION AND ORDER
(Adopted May 28, 1975; Released June 5, 1975)

By The Commission: Commissioner Reid Concurring In The Result; Commissioners Hooks And Washburn Absent; Commissioner Robinson Concurring In Part and Dissenting In Part.

1. The Commission has before it a series of pleadings[1] dealing with our recent decision[2] adopting rules governing cross-ownership of daily newspapers and television or radio stations in the same local area. Some of these plead-

[1] Petitions for Reconsideration of the *Second Report* and *Order* in this proceeding filed by (1) James B. Skewes and Southern Television Corporation, licensee of Station WTOK-TV, Meridian Mississippi; (2) The Brockway Company "Brockway", licensee of Station WWNO-TV, Carthage, New York; (3) The American Newspaper Publishers Association ("ANPA"); (4) Gray Communication System, Inc., licensee of Station WALB-TV, Albany, Georgia; and (5) Radio Stamford, Inc., applicant for the facilities of Stations WSTC AM and FM, Stamford, Connecticut. The licensee of the stations, Western Connecticut Broadcasting Company, filed an Opposition to this petition. In addition, a pleading titled Petition for Reconsideration was filed by the Findlay Publishing Company, licensee of Stations WFIN (AM) and WHMQ (FM), Findlay, Ohio, but the relief requested is different from other petitions as is explained below.

[2] *Second Report and Order*, 40 Fed. Reg. 6449 (1975).

ings are filed by parties subject to a divestiture requirement under the newly adopted rules, and in such cases seek either a clarification or an alteration of the standard we indicated would apply to the need for such divestiture. Some background information to place the subject in prespective is required.

2. In the *Second Report and Order* the Commission held that the public policy considerations favoring greater diversity of ownership (and on which the Commission relied in adopting a prospective rule) were not the only points to consider in examining existing daily newspaper-television station cross-ownership from the point of view of the possible need for divestiture. In addition to the theoretical advantage of greater diversity, the Commission determined that it was necessary to take into account the impact of any possible divestiture requirement on the public and affected parties alike, For existing stations,[3] balance was drawn so as to require divestiture by January 1, 1980, only in instances where the degree of media concentration (*i.e.*, lack of diversity) would be labeled as egregious. Seven television stations and nine radio stations were affected by the divestiture requirement. Under Sections 73.35(c), 73.240(c) and 73.636(c) of the new rules, television [590] station-daily newspaper combinations or radio station-daily newspaper combinations are to be considered as egregious if one party owns, operates or controls the only daily newspaper published in a community as well as the only television station that places city grade signal over the community or the only radio station(s) that place such a signal over the entire community. In effect, these

[3]Separate provisions of the new rules bar the creation of new combinations or the voluntary sale of existing combinations to a single party, on terms that are stricter than those provisions with dealing with divestiture. (See footnote 6.)

are considered to be monopoly situations in each medium, with a newspaper monopoly being said to exist if no other daily newspaper is published in the community, a television monopoly being said to exist if no other city-grade television signal encompasses the community and a radio monopoly being said to exist if no other city-grade radio signal encompasses the community.[4] Encompassment by a city-grade signal from a competing station, obviates the need for divestiture, but for this purpose only commercial stations are counted. Educational stations (television or radio) do not suffice nor do satellite television stations nor foreign stations nor translators, FM or television. Television semi-satellites, distinguished from satellites on the basis of the former's orgination of local news and public affairs, do suffice. For the purposes of the rules, interests in being on January 1, 1975, were the ones to which the divestiture provision applied.

3. With all this in mind, we turn first to the case presented jointly by Skewes and Southern Television Corporation. Their concern is that using a January 1, 1975, date for determining what interests need to be divested could force them to divest even though the facts upon which such an outcome would be premised might change. They acknowledge that the rule applies to their Meridian. Mississippi, newspaper/television cross-interests, but they point out that there is a satellite television station there which provides a city-grade signal to the entire community. While this satellite does not now (nor did it at January 1, 1975) qualify as a second service, their expectation is that the satellite station would soon become a

[4]However, if that community has its own separately owned television station, no divestiture need take place as to the radio station-newspaper combination.

semi-satellite and eventually a regular station.[5] They are fearful that such a change in the media situation might not be considered by the Commission. To protect them against this possibility they requested a clarification to indicate our willingness to take such a subsequent event into account.

4. This request is fair enough, for it was not the Commission's intention to ignore subsequent events that would remove the necessity for divestiture. Rather, it was an intention to limit the divestiture rule's applicability that led to use of the January 1, 1975, date. We did not intend to extend the list of divestiture cases even if the facts changed to bring other combinations within the ambit of the divestiture standard. This could happen, for example, if a competitive station changed its facilities or transmitter site with the result that it would withdraw its city-grade contour from encompassment of the newspaper community. While it could be argued that in a technical sense this would provide a basis for adding to the divestiture list, approaching the matter this way would add a perpetual uncertainty so that licenses could never be sure the issue was ever settled. This is clearly unacceptable. On the other hand, if the facts changed sufficiently so that the [591] situation ceased to be egregious, no purpose would be served by ignoring this change. Accordingly, we wish to make clear our complete readiness to consider such changes, but we warn any possibly affected parties that if events which they expect to happen do not come to pass, the divestiture requirement will nonetheless apply. In other words, we shall consider changes but shall not protect stations against an excess of

[5]Such is the Commission's expectation too, as indicated in our recent conditional grant of the renewal applications of this satellite and its Tupelo, Mississippi, parent station.

confidence in expecting them to take place in time to avoid the need for divestiture.

5. The next petition is that of the ANPA, in which it argues that the Commission was without authority to adopt the rules it has adopted and that our action doing so was contrary to the public interest. As to the former point, ANPA cities cases in support of the argument that it is improper to single out a particular class as ineligible to be licensees. Moreover, it charges that we are interfering with First Amendment rights, particularly by abridging the right to publish a newspaper. It also argues that the Commission erred on the factual premise underlying the new rules when it failed to recognize that newspapers and stations speak with separate voices even if they are under common ownership. In sum, we are charged with having improperly singled out newspaper publishers as second class citizens, a step which would harm not aid the public. It also argues that if the Commission did not agree with this overall view, it should at least establish a more flexible approach to application of the prospective rules and to showings that parties might provide to obviate the need for divestiture.

6. As to the prospective rules.[6] ANPA is concerned because, as existing combinations are sold to separate owners, the public could lose the benefit of the superior service that newspaper-licensed stations now provide. It also is concerned about problems that might arise in con-

[6]Specifically, these rules bar newspaper acquisition (initially or by voluntary change in ownership) of a station if the television Grade A, AM 2 mV/M or FM 1 mV/M contour encompasses or would encompass the city in which the newspaper is published. If existing combinations are voluntarily sold it must be separate buyers. See §§73.35(a), 73.240(a), and 73.636(a) for AM, FM and TV, respectively.

nection with being able to obtain outside equity capital. The requirements regarding operation of the corporation that lenders might specify to protect their investment could be viewed as causing a change in *de jure* even if not *de facto* control. Since the new rules would bar such a transfer of control over newspaper/station combinations. ANPA is of the view that the rules could impede the flow of needed capital, this damaging the operations. The only alternative we provided, obtaining a waiver, is a route ANPA says would be too slow and cumbersome to follow. ANPA argues that the prospective rules are a poor bargain, offering no real gain in diversity or otherwise. In any event, according to ANPA, the rules are not needed as the number of combinations has been dropping steadily even in the absence of rules. ANPA would have us amend the prospective rules to allow applicants proposing a new combination or transfer of an existing one to show either that such a combination would be consistent with a desire to maximize diversity or that there are other countervailing factors sufficient to justify creation or continuance of the combination. It sees such an approach as being no different from tbe balancing of the benefits and detriments that the Commission did in the area of divestiture.

7. ANPA asserts that in the area of divestiture, the Commission's definition of monopoly, based on city-grade encompassment, is overly [592] technical and in fact arbitrary. ANPA objects to the Commission's decision not to include other media in arriving at the divestiture group which were described as television and radio monopoly cases. The Commission is said to have gone beyond the Supreme Court's dictum in *RCA*[7] regarding sanctions

[7] *U.S. v. RCA*, 358 U.S. 334 (1959).

that might be called for in true monopoly situations. According to ANPA these are not monopoly situations as the affected parties could show. Merely to allow for the filing of waiver petitions is considered by ANPA to be inadequate, particularly if we do not allow more time than provided by the original August 12, 1975, deadline.[8] In addition, it wants the Commission to assure parties that arguments based on economic hardship or loss of service will be accepted as bases for waiver and that the Commission would view the entrance of a new newspaper or broadcast or cable service as sufficient to obviate the need for divestiture. Finally, it asks us to modify the statement in the *Second Report and Order* that we would not be inclined to grant waiver if it were premised on views we earlier rejected.

8. None of ANPA's major arguments are really new;[9] all were considered and rejected before and nothing it has said about these points since offers any basis to change our views. On the prospective aspect it offers nothing that refutes our earlier conclusion that more diversity would result by requiring that only non-newspaper parties may acquire broadcast interests in the area in which the newspaper is published. ANPA simply considers the gains to be smaller (or conjectural) and it would draw the balance differently, but this does not cast doubt on the subject of drawing the balance as is discussed at length in the *Second Report and Order.* That discussion need not

[8] ANPA also requests a clarification on the January 1, 1975, date; this point has been discussed above in connection with the Skewes petition.

[9] For example, we again must reject its argument that commonly owned media provide diversity. It is unrealistic to expect the same level of diversity as would be offered if the entities were under separate ownership.

be repeated except to say that we believe the gain in terms of diversity to be real as well as important. As to sales of existing interests, ANPA seems to be in the position of arguing that there is no need to be concerned about newspaper/broadcast combinations since through natural forces sales are taking place that reduce their numbers. Yet, it also seems to be contending that we should not require a separation at sale lest we lose a superior operator. These two positions are not consistent. Moreover, our finding of a small superiority in performance by newspaper licenses was in no way shown to be a result of the fact of owning a newspaper but rather could just as well be explained in terms of journalistic tradition and pioneering broadcast operations. In any event, we cannot assume a diminution of service would result. Moreover, looking only at the small superiority obscures the important gain in diversity which would result. We continue to believe that absent unusual circumstances, diversity is the more important point when it can be achieved without hardship or disruption. We believe that the prospective rules will do this. Newspapers as a class are not barred or subjected to discrimination. They are treated exactly in the same way a television licensee already was if it wished to obtain a radio station in its area: both are barred from doing so. As we set forth in the *Second Report and Order*, we are con- [593] vinced that authority for the actions taken is present and that it is not violative of First Amendment protections.

9. While ANPA thinks our divestiture rules are overly technical and that they ignore the fact that the public benefits from the receipt of various other media, we do not find its arguments on this point a persuasive basis for altering these rules. What it sees as overly technical, we see as both predictable and precise. As written, the rules

permit all parties to know the application of the standards so that there can be no ambiguity. This standard also is reflective of the actual media situation, although certainly not exactly. City-grade is a meaningful signal level and indicator of proximity. In addition, not all media, regardless of location, circulation or other aspects warrant being taken into account, particularly if their impact were clearly minor. ANPA offers nothing new on this point, nor does it show why mere numbers should govern regardless of the importance of the outlets. As to media, significant in themselves but geographically removed, the fact remains that outside media are just that, outside in terms of dealing with local problems, and thus a viewable television (or listenable radio) signal or the presence of a weekly news magazine cannot be the governing factor. The city-grade contour also is a concept that we have often employed in a context which although different from multiple ownership nonetheless reflected parallel thinking on the obligation of stations to serve nearby communities on a secondary basis. We continue to believe this standard enunciated in the *Ascertainment Primer* remains the appropriate standard.

10. It is not quite clear how ANPA's approach to waiver grounds differs from that of the *Second Report and Order* save for their clear desire that they be generously granted. We touched on economic hardship and possible loss of service as grounds on which to seek waiver in our earlier document and do not see a reason to make an alteration in those views which called for full consideration of either. On the matter of subsequent events that affect the need for divestiture, we agree that a new daily newspaper or station subsequently established would suffice, but we cannot take a similar view about a newly created cable system. That point like any other

will be considered and given appropriate weight in evaluating a waiver request. Many cable systems do not originate nor, of course, do they carry signals of stations dealing with local issues. The signals they import are those of outside stations. The presence of cable cannot be determinative for even with origination we cannot conclude that these originations would be the equal of what a station would do. We are ready, however, to consider the specifics of any particular situation which we might be asked to consider. The necessity to judge waiver requests on their merits and without prejudgment is not underminded if we warn parties in advance that arguments which we have rejected before will not provide support for waiver.

Parties remain free to offer all pertinent argument in support of waiver and we will consider their points carefully, but what they may not do is relitigate the basic premises, as if they were presenting us with another petition for reconsideration. To give an example: though a party subject to divestiture may wish that we had used encompass- [594] ment by a Grade A or Grade B contour instead of city-grade to show the presence of adequate diversity, that is a point to be made in a petition for reconsideration, not waiver. Once we have decided that issue, such a point of general applicability is resolved and not open to review in a waiver petition. A waiver petition, however, would be a place for attempting to show for example that special circumstances meant that in a particular case an incoming Grade A signal should be considered sufficient. Finally, we agree that no useful purpose would be served by insisting on an August 12 filing date for petitions for waiver now that it has become clear that judicial review will not be concluded by then. Sixty days after judicial review is completed seems an appropriate

date to substitute, one which should allow sufficient time to prepare the filing and would give ample time for our action before any divestiture need take place.[10]

11. The petition filed by Gray Communications notes its total disagreement with the Commission's decision but focuses its primary opposition on the Commission's statement that it was not inclined to hold evidentiary hearings on waiver requests. In Gray's view, the commission cannot properly evaluate the information regarding particular markets on which the grant of waiver would turn unless the affected licensee were afforded a hearing to offer these facts. Emphasizing court holdings which recognize a legitimate interest by broadcasters in having a security of tenure and in being able to obtain a preference for superior service, Gray asserts that both goals are being undermined by what it sees as a retroactive application of what is alleged to be a prospective rule. Even though it recognizes that court cases have held that rules (even if a license is modified in the process) can be put into effect without holding a prior evidentiary hearing, it argues that here the facts about the local situation are peculiarly within the knowledge of the licensee and hence a waiver hearing is necessary so they might be adduced. It also objects to our stated refusal when dealing with waiver requests to relitigate issues previously resolved.

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[10]KCMC, Inc., licensee of Station KTAL-TV, Texarkana, Texas, and co-owned with the only daily newspaper there has sought a declaratory ruling that it was incorrectly listed for divestiture. Pending action on that petition it has moved for an extension of time for filing a petition for waiver of § 73.636(e) to 120 days after the date on which the Commission releases an order disposing of the petition. Whether such an extension may later prove necessary cannot be determined now, so we shall grant the motion to the extent already specified for all other parties.

12. As to the final point, it must be rejected on the same basis as was the essentially similar argument of the ANPA. Likewise, the contention that waiver hearings are a necessity before divestiture could take place seems to rest on several misunderstandings. First, it has been long established that the Commission is able to modify a class of licenses during their terms by way of rule making actions.[11] Moreover, where individual modifications were involved, the Commission simply postponed the effective date until the current license term had expired, and on this basis there is no license modification during its term as the rule's application is deferred until much later, namely, January 1, 1980. Thus the §316 requirement for an evidentiary hearing does not apply. As to the consideration of the facts regarding the particular local situation, the Commission does not need to hold a hearing under ordinary circumstances. This is particularly the case where it is not the facts that are in dispute but their legal significance. If [595] there are disputed facts and a hearing is necessary to resolve them, the Commission can hold such a hearing, but such is not the norm, nor is it expected to be here. If the issues posed by the waiver petitions do not bear out the Commission's expectations, it can easily alter its procedures should fairness or other reasons so dictate.

13. We now turn to the only petition which would broaden the category of divestiture cases. Radio Stamford argues in its petition that the Commission should not have exempted the Stamford, Connecticut, Stations WSTC (AM) and WYRS (FM) which are the only ones licensed to the community and are owned in common with the only local daily newspaper. According to Radio

[11] See *e.g. WREN v. FCC*, 396 F.2d 601 (1d Cir. 1968) *Cert. den.* 393 U.S. 914 (1968).

Stamford, the only other city-grade signals that encompass Stamford are two clear channel AM stations in New York City, which it insists do not offer a locally oriented service to Stamford so as to provide a reasonable basis for concluding that there is real diversity there. To remedy this it would change the rule to not take into account an incoming city-grade signal if it originates in a separate SMSA. This, it argues, better coincides with the reasonable expectation regarding what needs a station will endeavor to service. The Licensee has opposed this with a lengthy engineering showing of the primary coverage available to Stamford and vicinity. It also charges Radio Stamford with a failure to participate earlier, something it sees as a fatal defect if the arguments are offered for the first time in a petition for reconsideration. It also questions Radio Stamford's standing, alleging that as a mere applicant it is not a party aggrieved. On the merits, we are asked to affirm our action which adopted standards that exempted Stamford.

14. We do not intend to rely on any alleged procedural deficiency in acting on this petition because we think it a matter we should reach on the merits. The petition requires denial because it rests on a fallacy and a misunderstanding. The fallacy is that our decision was based on a conclusion that the outside stations which encompass the newspaper community are operating in a manner to serve its needs. The misunderstanding is that if they do not already do so we did not intend a change in this situation. Neither is accurate. We recognized that some of the outside stations which encompass the newspaper communities were already serving the needs of these communities, but we also knew that a number of others were not doing so. Therefore, we stated in footnote 36 of the *Second Report and Order* that such sta-

tions would need to undertake this effort and direct themselves to these needs on a secondary basis. In this particular case the obligation is one to be shared by the two stations and discharged in a manner they think best conducive of our goal. We have been shown no reason to think this approach is any more unworkable or inappropriate here than elsewhere. On the other hand, having a rule which would be dependent on the vagaries of changing SMSA definitions and station location would not promote fairness but it would introduce difficulties in administration. Finally, we have a problem with any suggested alternative which is geared to deal with a particular situation, as appears to be the case here, rather than the general situation. This is neither necessary nor wise, and we shall reject it.

15. We now come to the very extensive filing by The Brockway Company, publisher of the only daily newspaper at Watertown, New York, and the licensee of the only full-fledged American commercial [596] television station that provides Watertown with a city-grade signal. Brockway contends that the Commission erred in refusing to consider encompassment by educational television stations and for this and other reasons considers the standards employed by the Commission to be unrealistic. It also objects to the Commission's action on its own motion exempting a television station at Hickory, North Carolina, and a radio station at Brookfield, Missouri, from the impact of the rules. Brockway asserts that if the Commission thinks it proper to evaluate qualitative matters as it did in those two cases and thereby extend its inquiry beyond a simple examination of city-grade contours, then it needs to do so for Brockway's situation as well and recognize the inapproppriateness of divestiture. According to Brockway, there is significant attention to

the affairs of Watertown that is provided by media not counted under the Commission's test and it urges the Commission to examine the situation so that these points can be taken into account.

16. Although Brockway has offered a large amount of information regarding its own situation, much of this is material better directed to obtain waiver. To take one example: if Brockway's argument were that educational stations as a group provided sufficient news and public affairs to be counted as a commercial station would be, that is a matter which is appropriate for resolution here. On the other hand, if the argument is based on the programming of the particular station that encompasses Watertown with a city-grade signal, it is a quite different matter, one far more suitable to consideration in connection with a waiver request. The reason is simple to understand; without a showing that this is the typical case, it is impossible to rely on this information to show the general situation, and it is just this norm which is the suitable basis for rule making and what differentiates it from *ad hoc* adjudications. While much of the information and argument may not be suitably considered now, Brockway is entitled to have it considered on the merits. To simplify matters it may incorporate the present pleadings by reference in any supplementary material it files seeking waiver. The general issues, of course, will be resolved here.

17. We do not agree with Brockway that on an across-the-board basis educational and commercial stations can or should be considered as equivalent for the purposes of these rules. That the Commission is considering imposing formal ascertainment requirements on educational stations is not the point. Nor is there any dispute about the observation in the ascertainment *Notice* that educational

stations have always had the duty to determine local needs and respond to them. Although, the general obligation of serving the public interest accompanies any broadcast license, for this fact to be meaningful here, it would be necessary for the response to this obligation to take such a form as would demonstrate adequate diversity. No requirement governing the nature of the programming effort of an educational station exists, and formalizing the ascertainment process would not change this fact. Specifically, in view of the extremely high costs involved, there is very little news gathering on the local scene by educational stations. Even if they present news and public affairs of a non-local nature this is not demonstrative of diversity on local issues. This lack of local orientation was the reason for our action refusing to take into account commercial signals of less than city-grade. Brockway states that there is no mini- [397] mum specified in the time a commercial station devotes to news or public affairs, but this fact does not obscure a recognition of the situation as it exists. Moreover, if the implication of of Brockway's argument were true, it would cast doubt on automatically exempting combinations if an outside commercial station encompassed the newspaper community. This would be the result of our not being able to rely on the fact that these stations offer news and public affairs, and under this test, encompassment would be irrelevant unless we found a significant programming response in local news and public affairs. This method of proceeding was implicitly rejected in the *Second Report and Order* because we did not want to enter a thicket of qualitative judgments, based on the performance of stations on an individual basis. Nonetheless, when it comes to waiver rather than the establishment of general rules, the particular efforts of the educational station in Brock-

way's area could be considered for whatever weight they deserve. Since we cannot simply equate educational and commercial stations, changing the rules on such a premise must be rejected.

18. Brockway charges it is arbitrary to include its interests on the list for divestiture even though there are three other city-grade signals available (one translator, one educational and one Canadian) and it has a program-originating cable system and receives two Grade B television signals from Syracuse stations. This it contrasts with the Columbus, Mississippi, situation where no divestiture was required because a Tupelo, Mississippi, station provides a city-grade signal, the only other one the residents of that city receive. It asserts that its own situation is much different with much more diversity being offered by media not present in the other case. It also asserts that the Tupelo station does not address the needs of Columbus. The trouble with this argument is that Brockway in effect is asking us to hold on a general basis that several apples (translators, Grade A or B signals, etc.) count as much or more than one orange (a city-grade signal). The rule specifies the latter and not the former because one city-grade signal if it encompassed was thought to suffice and the other media were not thought to have enough impact or directed themselves to local issues and we continue to believe this.

19. Just as with educational stations, we were not prepared to accept translators or foreign stations as sufficient to demonstrate diversity. A translator is nothing more than a low power station which functions as a mechanism for extending the range of a distant station, which by virtue of its separation does not respond to the needs of the newspaper community. Realistically it could not be required to do so. This is not to say that the choice of

entertainment and other programs which translator stations help make possible is not important; it is. In fact, on national or state issues they can offer material which is important in providing diversity, but this does not extend to the area of local news and issues, and this is the vital concern with which we were dealing. A foreign station ordinarily would not do so either, and as we observed before, even if it did, there is no certainty that it would continue doing so or a way this Commission could act to insure that it would. Finally, there is the presence of a cable system, but here, too, even with origination, the system could not be considered the equal of a station providing a city-grade signal. Any argument that a particular system offers such diversity on a par with a city-grade signal, belongs in a waiver context, [598] not here. Nor do all systems have the percentage of subscribers that the Watertown system does, not does it typify the industry in terms of local origination. Thus, while the special facts may be considered in connection with a waiver request, we cannot use them to formulate a revision of a rule of general applicability.

20. Finally, Brockway would have us re-write the rules to include consideration of smaller local media and media from outside the city of Watertown, since in its view theirs is not a "local" market as such but one containing several counties in its primary area. Under their system, Grade A and Grade B signals would also be included and so would the cumulative impact of weekly newspapers. This, however, is not dispositive on the matter of our primary concern, that of local diversity. Outside media ordinarily cannot be expected to give much attention to local affairs and the smaller local media would ordinarily not be expected to have a large impact. Brockway is free to pursue its argument that its case is unusual in this

regard and seek waiver on this basis. Also, while the advertising market may resemble the picture Brockway offers, this does not connect with the principal concern, that of diversity.[12] To the extent that these or any other matters demonstrate that the situation in a particular area so differs from the norm as to arguably support waiver on that basis, parties are free to so allege. When, as in Hickory and Brookfield, the facts are clear at first blush, we need not wait for a petition. Reconsideration, however, must be denied.[13]

21. The previous discussion has dealt with all the petitions for reconsideration properly before us.[14] There is another pleading entitled petition for reconsideration, but this filing, by the Findlay Publishing Company, does not seek reconsideration of the rules we adopted as such. Rather, it seeks to have the divestiture requirement which was applied to it lifted on the basis of encompassment of the community by another city-grade signal. Because of this fact the petition will be acted upon separately when the review and analysis of the engineering data is submitted is completed.

22. Although it was not mentioned by any of the parties, there is one additional aspect to consider. In Sec-

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[12]When it comes to soliciting advertising, it does not seem that the outside media would be able to compete effectively or that the weekly newspaper would have much of an impact.

[13]A motion was filed by the National Citizens Committee for Broadcasting seeking expedited consideration of the petitions on which we are now acting. While we are not acting quite as speedily as it would have liked, the action is nonetheless quite prompt and in effect grants the relief requested.

[14]On May 2, 1975, the Nebraska Broadcasters Association, Inc. filed "Comments" but this filing is untimely even if intended as a petition for reconsideration and it need not be considered.

tions 73.35(c), 73 .240(c), and 73.636(c), we used the phrase "place(s) a city-grade signal over the community" to express the concept that the city-grade signal was the concept that the city-grade signal was the indicator of diversity in connection with possible divestiture. However, when it came to the prospective part of the new rules, the word "encompassing" was used instead. Since the same concept – inclusion of the entire community inside the city-grade contour – is involved, it is appropriate to make the editorial change of conforming the language to use encompassing throughout. Sections 73.35(c), 73.240(c) and 73.636(c) will be changed accordingly. Section 73.35(c) and 73.240(c) will also be changed to reflect an editorial correction.

23. Accordingly, IT IS ORDERED. That the relief requested in the subject petitions IS GRANTED to the extent indicated and to all other respects IS DENIED.

24. IT IS FURTHER ORDERED that the Comments filed by the Nebraska Broadcasters Association, Inc. ARE DISMISSED.

25. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended. Sections 73.35(c), 73.240(c) and 73.636(c) ARE AMENDED as set forth in the attached Appendix effective July 11, 1975.

26. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

Federal Communications Commission,
Vincent J. Mullins, *Secretary*.

APPENDIX

1. Section 73.35(c) is amended to read as follows:

§73.35 MULTIPLE OWNERSHIP

* * *

(e) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates of controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for A.M. predicted for F.M.). The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

* * *

2. Section 73.240(c) is amended to read as follows:

§73.240 MULTIPLE OWNERSHIP.

* * *

(e) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for A.M. predicted for

F.M.). The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

* * *

3. Section 73.636(c) is amended to read as follows:

* * *

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial television station encompassing the entire community with a city-grade signal. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980.

* * *

[555 F.2d 938]

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Elyria-Lorain Broadcasting Co., et al., Intervenors.

OWOSSO BROADCASTING COMPANY, INC., Petitioner,

v.

UNITED STATES of America and Federal Communications Commission, Respondents,

KSL, Inc., Intervenor.

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and the United States of America, Respondent,

KSL, Inc., Intervenor.

WJAG, INC., Petitioner,

v.

UNITED STATES of America and Federal Communications Commission, Respondents,

WHAS, Inc., Louisiana Television Broadcasting Corp., Intervenors.

The OGDEN NEWSPAPERS, INC., Petitioner,

v.

UNITED STATES of America and Federal Communications Commission, Respondents,

KSL, Inc., Intervenor (two cases).

DAILY TELEGRAPH PRINTING COMPANY, Petitioner,

v.

UNITED STATES of America and Federal Communications Commission, Respondents,

WHAS, Inc., Louisiana Television Broadcasting Corporation, KSL, Inc., Intervenors.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

KSL, Inc., Intervenor.

The BROCKWAY COMPANY, Petitioner,

v.

UNITED STATES of America and Federal Communications Commission, Respondents,

KSL, Inc., Intervenor.

GRAY COMMUNICATIONS SYSTEMS, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

KSL, Inc., Intervenor.

Nos. 75–1064, 75–1152, 75–1289, 75–1379, 75–1386, 75–1387, 75–1388, 75–1567, 75–1614 and 75–1618.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 17, 1976.

Decided March 1, 1977.

* * *

[942] Petitions for Review of an Order of the Federal Communications Commission.

Frank W. Lloyd, III, with whom Charles M. Firestone and Henry Geller, Washington, D. C., were on the brief for petitioner in No. 75–1064.

Thomas H. Wall, Washington, D. C., with whom Suzanne Meyer, New York City, Jon H. Marple, B. Dwight Perry and Alan C. Campbell, Washington, D. C., were on the brief for petitioners in Nos. 75–1263 and 75–1387.

Lee Loevinger, Robert R. Bruce, James H. Sneed and Jonathan S. Kahan, Washington, D. C., were on the brief for petitioner in No. 75–1289. Martin Michaelson, Washington, D. C., also entered an appearance for petitioner in No. 75–1289.

Aloysius B. McCabe, Washington, D. C., with whom Michael Yourshaw and Arthur B. Hanson, Washington, D. C., were on the brief for petitioner in No. 75–1567 and intervenor American Newspaper Publishers Association in No. 75–1064.

John P. Southmayd, Washington, D. C., with whom Richard R. Zaragoza, Washington, D. C., was on the grief for petitioner in No. 75–1614.

Robert B. Nicholson, Atty., Dept. of Justice, Washington, D. C., with whom Barry Grossman, Atty., Dept. of Justice, Washington, D. C., was on the brief for respondent, United States of America.

Werner K. Hartenberger, Counsel, F. C. C., Washington, D. C., for respondent F. C. C., Ashton R. Hardy, Gen. Counsel, F. C. C., Daniel M. Armstrong, Associate Gen. Counsel, Charles H. Bell, Jr., Willard R. Nichols and Sheldon M. Guttmann, Counsel, F. C. C., Washington, D. C., were on the brief for respondent, F. C. C. Joseph A. Marino, Gregory Christopher and Stephen A. Sharp, Attys., F. C. C., Washington, D. C., also entered appearances for respondent F. C. C.

Ernest W. Jennes, Washington, D. C., with whom Russell H. Carpenter, Jr., Washington, D. C., was on the brief for intervenors The Washington Post Company and

Post-Newsweek Stations, Capitol Area Inc., Nicholas W. Fels, Washington, D. C., also entered an appearance for intervenors The Washington Post Co., et al.

William J. Dempsey, Frederick H. Walton, Jr., and Christopher J. Reynolds, Washington, D. C., were on the brief for intervenor Belo Broadcasting Corporation.

Paul Dobin, Washington, D. C., was on the brief for intervenor Louisiana Television Broadcasting Corporation.

James E. Greeley and Lawrence J. Bernard, Jr., Washington, D. C., were on the brief for petitioner in No. 75–1152.

Richard Hildreth, Washington, D. C., was on the brief for petitioner in No. 75–1379.

R. Russell Eagan and Robert A. Beizer, Washington, D. C., were on the brief for petitioner in No. 75–1618.

Lee M. Mitchell, Washington, D. C., was on the brief for intervenor WHAS, Inc., in Nos. 75–1064, 75–1379 and 75–1387.

Glen A. Wilkinson, Robert W. Barker and William R. Loftus, Washington, D. C., were on the brief for intervenor KSL, Inc.

John H. Midlen and Dennis F. Begley, Washington, D. C., were on the brief for

intervenors KNUJ, Inc., Michelson Media and The Post Company.

Louis J. Sirico, Jr., and Martin H. Rogol, Hartford, Conn., filed a brief on behalf of Public Interest Research Group, et al. as amici curiae.

Marcus Cohn, Paul Dobin and Martin J. Gaynes, Washington, D. C., entered appearances for intervenors Elyria-Lorain Broadcasting Co. and WEEU Broadcasting Co.

James P. Holden, Washington, D. C., entered an appearance for petitioner in Nos. 75–1686 and 75–1688.

William J. Dempsey and Christopher J. Reynolds, Washington, D. C., entered ap-
[943] pearances for intervenors The Hearst Corporation and Scripps-Howard Broadcasting Co., et al.

James A. McKenna, Jr., Thomas N. Frohock and Steven A. Lerman, Washington, D. C., entered appearances for intervenors General Electric Broadcasting Co., Inc., Forward Communications Corporation, et al. and American Broadcasting Companies, Inc.

Peter D. O'Connell, Washington, D. C., entered an appearance for intervenors Lee Enterprises, Inc., et al.

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William M. Barnard, Washington, D. C., entered an appearance for intervenors Houston Post Company, et al.

William J. Potts, Washington, D. C., entered an appearance for intervenor KUTV, Inc.

Frank U. Fletcher, Robert L. Heald and Marvin Rosenberg, Washington, D. C., also entered appearance for intervenors The Chronicle Publishing Company, et al.

Before BAZELON, Chief Judge, WRIGHT and ROBINSON, Circuit Judges.

Opinion for the Court filed by Chief Judge BAZELON.

BAZELON, Chief Judge:

At issue are Federal Communications Commission regulations dealing with one aspect of media ownership concentration: newspaper-broadcast station cross-ownership. *Second Report and Order* (*Order*), 50 F.C.C.2d 1046 (1974), *reconsidered* 53 F.C.C.2d 589 (1975).[1] In 1970 the Commission

1. In addition to the newspaper-television regulations, 47 C.F.R. § 73.636(c), which form the heart of this case, the Commission also promul-

[footnote continued]

proposed rules entirely eliminating newspaper-broadcast affiliation in a common city of operation. Docket 18110, 22 F.C.C.2d 349 (1970). Following a lengthy rulemaking proceeding, the Commission issued the more limited ban challenged here by the National Citizens Committee for Broadcasting, the Justice Department and various media interests.[2]

gated similar regulations regarding newspaper-radio station combinations. *But see* note 18, *infra*, 47 C.F.R. §§ 73.35(c), 73.240(c). Two of the petitioners, WJAG, Incorporated and Owosso Broadcasting, Inc., operate radio stations and presumably challenge those regulations. Their briefs, however, merely incorporate by reference briefs filed by other parties which do not distinguish between the radio and television regulations. Our discussion, therefore, will pertain equally to both sets of regulations.

The *First Report and Order* in Docket 18110, 22 F.C.C.2d 306 (1970), proscribed the formation of new AM–FM combinations serving the same market and placed restrictions on the transfer of existing combinations. These regulations are not at issue in this appeal.

2. In addition to WJAG, Inc., and Owosso, briefs were filed by the following parties representing media interest: Daily Telegraph Printing Company (Daily Telegraph), Gray Communications Systems, Inc. (Gray), the Brockway Company (Brockway), National Association of Broadcasters (NAB), and American Newspaper Publishers Association (ANPA).

In relevant part, the rules: [3]

1) forbid the future formation or transfer of co-located newspaper-broadcast combinations [4];

2) preserve existing combinations except those in communities served by only one daily newspaper and one broadcast station encompassing the community with a city grade signal; in the latter cases, one of the interests must be divested within five years.[5]

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3. The rules are codified at 47 C.F.R. §§ 73.35, 73.240, 73.636.

4. Both halves of a combination cannot be transferred to the same party except by inheritance, 50 F.C.C.2d 1046, 1076 (1975). A broadcast license will not be issued to a local daily newspaper; if a broadcast licensee acquires a daily newspaper in the city in which it is licensed, it must dispose of the station within one year. *Id.* at 1074–76, 1099–1107.

5. Several definitions and qualifications are important. "Ownership" is not limited to majority stock ownership but "includes actual working control in whatever manner exercised." 47 C.F.R. § 73.636 note 1 *et seq.* Noncommercial educational stations and college newspapers

[footnote continued]

[944] **Under the latter rule, roughly 90% of existing combinations are grandfathered. For the reasons expressed below, we affirm the prospective ban but vacate the rules dealing with existing combinations.**

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are not subject to the divestiture rules and their presence in a community does not exempt local monopolies from the rules. 47 C.F.R. § 73.636(b), and note 10. "A daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication." 47 C.F.R. § 73.636 note 10. A "city grade signal," the most intense under the Commission's rules, provides a clear signal to the entire community to which the station is licensed. 47 C.F.R. §§ 73.685, 73.315, 73.188. The Commission chose not to use a grade A or grade B contour in determining the number of media voices in a community. A "grade A contour" is the line at which a good picture may be expected to be available for at least 90% of the time at the best 70% of receiver locations at the outer limits of that service area; a "grade B contour" is the line at which a good picture may be expected to be available for at least 90% of the time at the best 50% of receiver locations. *Clarksburg Publishing Company v. F.C.C.*, 96 U.S.App.D.C. 211, 225 F.2d 511, 516 n.12 (1955). For Commission policy on waivers and petitions to deny, *see* notes 19–21 *infra* and accompanying text.

I. THE RULEMAKING PROCEEDING AND ORDER

A. *The Proceeding.*

The Commission has long been aware that concentrated ownership threatens the public interest in a diversified mass communications media. The Commission's first multiple ownership rules, adopted in the 1940's, prohibited any party from owning or controlling more than one broadcast station in the same broadcast service in the same area.[6] As a result of the AM radio rules,

6. Fed.Reg. 2382 (1940), 6 Fed.Reg. 2282 (1941); 8 Fed.Reg. 16065 (1943). About this time the Commission also adopted the "Chain Broadcasting" rules, designed to combat the growing power of networks. As a result of these rules, the National Broadcasting Company was required to divest one of its dual networks, which eventually became the American Broadcasting Company. Docket 5060, May 1941. The Supreme Court upheld the Commission's authority to promulgate these rules, noting that the Commission may call on antitrust policies in implementing its public interest mandate. *NBC v. United States*, 319 U.S. 190, 223, 63 S.Ct. 997, 87 L.Ed. 1344 (1943). The Commission also conducted during the 1940's an inquiry into potential problems of newspaper and broadcast station cross-ownership, but decided at that time to control cross-ownership abuses on a case by case basis rather than by rule. 6 Fed.Reg. 1580, 3302 (1940); 9 Fed.Reg. 702 (1944).

divestiture was ordered in 24 cases.[7] The rules have since been tightened several times, most recently in the early stages of Docket 18110 to prohibit the common ownership of more than one broadcast station of any type in the same service area.[8] The Commission enacted these rules without compiling a substantial record of tangible harm; it rested instead on its belief that "the effects of competition or its absence," are "not readily susceptible of quantitative ascertainments." 29 Fed.Reg. 7535, 7537, Docket 14711 (1967). The Commission has always viewed diversification as a factor of central importance in comparative license hearings.[9]

7. 1945 FCC Annual Report at 2. The FM radio and VHF TV rules operated prospectively only.

8. In 1953 the Commission imposed numerical limitations on the number of stations one individual could control, its authority being upheld in *United States v. Storer Broadcasting*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956). The multiple ownership rules were amended once again in 1964 to define precisely the standard for determining prohibited contour overlap. Multiple Ownership Rules, 2 Pike & Fischer RR 2d 1588 (1964).

9. In *McClatchy Broadcasting Co. v. FCC*, 99 U.S.App.D.C. 195, 239 F.2d 15, 18 (1956), for

[footnote continued]

[945] In 1970 the Commission broadened the scope of ongoing rulemaking proceedings, Docket 18110, to consider whether newspaper-broadcasting affiliation was in the pub-

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example, the court wrote, "In considering the public interest the Commission is well within the law when, in choosing between applications, it attaches significance to the fact that one, in contrast to the other, is disassociated from existing media of mass communication [newspapers] in the area affected," *quoting Sripps-Howard Radio, Inc. v. FCC*, 89 U.S.App. D.C. 13, 189 F.2d 677, 683 (1951). In its *1965 Policy Statement on Comparative Renewal Hearings*, the Commission concluded that diversification should be a primary factor in allocating contested broadcast assignments. The Commission wrote,

> Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.

1 F.C.C.2d 393, 394. The Commission has applied the *1965 Policy Statement* in noncomparative hearings, although by its terms it is not applicable. *Seven League Productions, Inc.*, 1 F.C.C.2d 1597 (1965); *A. H. Belo Broadcasting Corp.*, 47 F.C.C.2d 540 (1974). *See generally, Comparing the Incomparable Towards a Structural Model for FCC Comparative Renewal Hearings*, 43 U.Chi.L.Rev. 573 (1976).

lic interest.[10] 22 F.C.C.2d 339. Citing figures indicating the high incidence of newspaper-television affiliation,[11] and the popular dependency on these media as information sources, the notice of proposed rulemaking stated that, as with two television stations, it is not "desirable that these two organs . . . be under the same control in any community." *Id.* at 344, 346. The Commission suggested that promotion

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10. Examination of newspaper-television station cross-ownership is a logical outgrowth of the Commission's ongoing concern with concentrated ownership. Apart from Docket 18110, the Commission has recently prohibited television networks from owning cable interests and telephone companies from operating cable systems in their service areas. *See Iacopi v. F.C.C.*, 451 F.2d 1142 (9th Cir. 1971); *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971). The Commission also considered ordering newspapers to divest their cable systems, *CATV Notice of Proposed Rulemaking and Inquiry*, Docket 18891, 23 F.C.C.2d 833 (1970), but ultimately decided not to do so, 52 F.C.C.2d 170 (1975).

11. At the time of the *Notice of Proposed Rulemaking*, there were 94 newspaper-television combinations, of which 34 were in the top 50 markets, and 52 in the top 100. 22 F.C.C.2d at 345. In 1975, 79 were still intact.

of media competition and maximum diversification of media viewpoints might require the separation of all co-located newspaper-broadcast combinations. Since the Commission contemplated allowing divestiture to take place over five years under favorable tax treatment,[12] it expressed confidence that such a rule would produce no more than minimal economic losses. *Id.* at 347–48. Comments were invited.

Not surprisingly, the proposed rules generated considerable interest. Nearly 200 parties filed comments. In addition, roughly 25 major studies were lodged, *Order* at 1090–1094, although as will be explained in Section IV–A *infra*, the studies were of surprisingly little value.[13] In March 1974,

12. The Commission indicated it would certify divestiture sales under the favorable gains provision of section 1071 of the Internal Revenue Code of 1954, as amended. 26 U.S.C. § 1071. The Commission also theorized that swapping of affected stations would further minimize losses. 22 F.C.C.2d at 347.

13. In its brief, the Commission characterizes the studies as generally "inconclusive or unrealistic." Br. at 9, n.6. Although it did not state this opinion so baldly in the *Order*, it repeatedly criticized many of the individual studies. *See generally*, Note, *Media Cross-Ownership—The FCC's Inadequate Response*, 54 Tex.L.Rev. 336 (1976).

the Commission requested additional comments dealing primarily with the central problem of newspaper-television cross-ownership. 45 F.C.C.2d 768. Forty eight parties filed fresh comments.[14] Three days of oral argument were held and the *Order* was released on January 31, 1975.

14. Amicus curiae, Public Interest Research Group et al., contend a remand is necessary because the Commission failed to develop an adequate "public interest" record. Only 2 of the original 200 comments and 6 of the subsequent 48 filings were filed by public interest groups. In light of our disposition of this case, we have no need to consider whether an agency has an affirmative obligation, not imposed by the Administrative Procedure Act, to seek out public interest comments. In any event, Docket 18110 was exceptionally well publicized. The Commission deferred all petitions to deny that alleged undue economic concentration until the docket was completed, calling further attention to the existence of the docket. *See, e. g., Hale v. F.C.C.*, 138 U.S.App.D.C. 125, 425 F.2d 556 (1971); *Stone v. F.C.C.*, 151 U.S. App.D.C. 145, 466 F.2d 316 (1972). And, unlike *NAITPD v. F.C.C.*, 502 F.2d 249, 258 (2d Cir. 1974), public interest groups actively participated in the proceeding. We would, of course, applaud any effort of the Commission to broaden the base of its rulemaking proceedings.

B. *The Order.*

After summarizing the comments and studies filed in Docket 18110, the Commission explained its justification for the prospective ban. Although the Commission had at one time encouraged newspaper sponsorship of broadcast stations, it concluded this policy was no longer warranted because broadcast licenses had become attractive to other types of investors. It had come to believe that "any new licensing
[946] should be expected to add to local diversity," *Order* at 1075. Because granting a broadcast license to a local newspaper owner could not be expected "to enhance diversity," *id.*, the Commission decided to prohibit the creation of future combinations. However, a geographic limit was placed on this ban because "there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership." *Id.* Recognizing that various limits could be imposed, the Commission chose to employ the pattern used in earlier multiple ownership rules; the ban applies only if the station in question would or does encompass the common city with a city grade signal. *Id.*[15]

15. *See* note 5 *supra*.

The Commission then focused on the more difficult question—what to do with existing co-located combinations. Initially, the Commission noted it had not yet paid sufficient consideration to certain possible side-effects of divestiture—reduction of local ownership, disruption of broadcasting continuity and local economic dislocations. *Order* at 1073. Claiming that stability and continuity of ownership serve the public interest, the Commission concluded that "a mere hoped for gain in diversity" was not adequate cause for disrupting ownership. Divestiture would be ordered "in only the most egregious cases." *Order* at 1080. In framing its *Order*, the Commission chose not to focus, as the Justice Department suggested, on competition for advertising, citing authority that it has discretion to determine the weight to be given antitrust principles in shaping its regulatory policy.[16]

16. *Northern Natural Gas Co. v. F.P.C.*, 130 U.S. App.D.C. 220, 399 F.2d 953, 959 (1968) (citing cases). Earlier in the *Order*, however, the Commission stated that the prospective rules were based primarily on First Amendment concerns whereas the retroactive rules were based on both First Amendment and antitrust policies, *Order* at 1049.

Instead, the Commission stated that the number of media voices serving a given area was a more important concern.

> If our democratic society is to function, *nothing can be more important* than insuring that there is a free flow of information from as many divergent sources as possible. . . .

Order at 1079 (emphasis added).

The Commission then explained a combination would be considered an "egregious case" if it had an "effective monopoly in the marketplace of ideas" with respect to local issues. Although the Commission stated it had examined "every" combination "known to us," *Order* at 1081, the record contained no evidence suggesting which combinations were monopolies in this sense. Instead, the Commission relied heavily on its experience, determining that a non-affiliated broadcast station encompassing the city of publication with a city grade signal could reasonably be expected to provide a sufficient additional voice on local matters, but that stations bathing the area with the weaker Grade A or Grade B signals could not.[17] Thus, the Commission ordered divestiture only where no other newspaper or city grade broadcast station was operating in the locality of the combination.[18]

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17. For definitions of these contours, *see* note 5 *supra*. Several parties vigorously asserted that

[footnote continued]

Grade A and Grade B signals should be considered in determining the number of effective media outlets because, under the Commission's local ascertainment rules, stations are obligated to consider the needs of those residing within those contours. Although conceding that a station has a secondary obligation to ascertain the needs of nearby communities, the Commission nonetheless observed that it would be unrealistic to expect a station to give adequate attention to the local problems of areas on the margins of its contour. *Order* at 1082.

18. Divestiture was ordered in the cases of 7 out of 79 television-newspaper and 16 radio-newspaper combinations. In addition, a television-newspaper combination in Hickory, North Carolina, and a radio-newspaper combination in Brookfield, Missouri, fell within the divestiture requirement. But the Commission *sua sponte* granted waivers in each case. *Order* at 1085.

On one level, radio and television stations are treated equally under these regulations; divestiture is required if either type of station and an affiliated daily newspaper are the only media voices in the community. However, the existence of a city grade television station is sufficient to exempt a radio combination from divestiture, but the existence of a city grade radio station does not exempt a television combination. The difference in treatment is premised on the fact that television is the vastly more powerful medium.

[947] As in its notice of proposed rule making, the Commission stressed that temporary or permanent waivers would be granted where appropriate because it did not intend to work a forfeiture through divestiture.[19] It made clear, though, it would not reconsider in waiver proceedings issues resolved in Docket 18110. *Order* at 1085.[20] Finally, the Commission indicated it did not intend to ignore antitrust considerations entirely, and would therefore continue to entertain petitions to deny on grounds of economic concentration. However, it tightened the requirements for granting such petitions,

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19. Temporary or permanent waivers would be appropriate if, for example, it were impossible to sell one of the interests or if sale could only be accomplished at an artificially depressed price. *Order* at 1085.

20. In its *Reconsideration*, the Commission explained this point. A petition contending that in general, the presence of independent educational stations should exempt monopoly combinations from divestiture would not be set for hearing because that issue had been determined in the docket. On the other hand, a hearing would be set if the petition alleged that a particular educational station in fact was providing a community with an adequate additional voice. 53 F.C.C.2d at 235.

holding that it would set a hearing only when a violation of the Sherman Act was alleged. *Order* at 1088.[21]

The Commission reconsidered its regulations but did not materially alter them. 53 F.C.C.2d 589 (1975). The various petitioners then brought this appeal assailing the rules on numerous grounds.

The remainder of the opinion will be organized as follows, with the first page of each section being noted in parentheses.

II. Validity of the Prospective Ban (178 U.S.App.D.C. p. ——, 555 F.2d p. 947)

A. Whether the Prospective Ban Has a Rational Basis (178 U.S.App.D.C. p. ——, 555 F.2d p. 948)

B. Whether the Prospective Ban Exceeds the Commission's Authority (178 U.S.App.D.C. p. ——, 555 F.2d p. 951)

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21. The Commission had previously considered factors such as the size, extent and location of areas served; the number of people served; the classes of stations involved; and the extent of other competitive service to the areas in question in passing on petitions to deny on grounds of economic concentration. 47 C.F.R. §§ 73.53(b), 73.420(a)(2), 73.636(a)(2).

C. Whether the Prospective Ban Violates the First Amendment (178 U.S. App.D.C. p. ——, 555 F.2d p. 953)

III. Whether the Commission May Adopt Any Rule That Orders Divestiture Without an Evidentiary Hearing (178 U.S.App.D.C. p. ——, 555 F.2d p. 955)

IV. Validity of the Divestiture Rule Adopted by the Commission (178 U.S. App.D.C. p. ——, 555 F.2d p. 956)

A. Record Support for the Divestiture Order (178 U.S.App.D.C. p. ——, 555 F.2d p. 956)

B. Whether the Commission May Properly Require a Showing of Tangible Public Interest Harm to Support Divestiture (178 U.S.App.D.C. p. ——, 555 F.2d p. 961)

Conclusion (178 U.S.App.D.C. p. ——, 555 F.2d p. 966)

II. VALIDITY OF THE PROSPECTIVE BAN

[1–3] The Commission must allocate use of the public airways by granting renewable licenses of no more than three years in the "public interest, convenience and necessity." 47 U.S.C.A. §§ 301, 303, 309(a). Congress purposely left this mandate open-ended so that the Commission could fashion its regulations in light of changing conditions. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S.Ct. 437, 84 L.Ed. 656 (1940). In exercising its function, the Commission may enact eligibility standards for licenses. *United States v. Storer Broadcasting*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1955). Furthermore, the Commission may, under its authority to "encourage the larger and more effective use of radio in the public
[948] interest," 47 U.S.C. § 303(g), enact rules designed to curb potential abuses, *Metropolitan Television Co. v. F.C.C.*, 110 U.S.App. D.C. 133, 289 F.2d 874 (1961).

[4–8] Because the Commission has the primary responsibility for allocating use of the electromagnetic spectrum, a presumption of correctness attaches to its regulations. *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943). Of course, courts are not to rubber-stamp Commission regulations. On the contrary, review is to be "searching." *Citizens to Preserve Overton Park v. Volpe*,

401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). This is especially so where the regulations touch on areas heavily laden with First Amendment interests.[22] Yet despite this care, courts are not to substitute their judgment for that of the Commission or review the facts de novo. With respect to the prospective rules, which reflect a legislative type policy judgment,[23] as opposed to the retroactive rules, which purport to be based also on factual considerations,[24] our primary task will be to ensure that the regulations are not "arbitrary, ca-

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22. More intense review is appropriate when Commission regulations or decisions trench on Constitutional rights, such as free speech. The Commission's expertise does not extend to Constitutional interpretation. *National Broadcasting Co., Inc. v. FCC*, 170 U.S.App.D.C. 173, 516 F.2d 1101 (1974); *Yale Broadcasting Co. v. FCC*, 155 U.S.App.D.C. 390, 478 F.2d 594 (Bazelon, Statement as to why he would grant rehearing en banc), *cert. denied*, 414 U.S. 914, 94 S.Ct. 211, 38 L.Ed.2d 152 (1973).

23. "The rules are not in the least premised on the existence of improprieties in the operation of the media holdings." *Order* at 1085.

24. The factual nature of the retroactive rules will not alter the intensity of review but only the direction it takes. *See* text and notes at notes 53–54 *infra*.

pricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In addition, we must examine the contentions that the rules exceed the Commission's authority and violate the First Amendment.

A. *Whether the Prospective Ban Has a Rational Basis*

The licensing of speakers required by the Communications Act is unprecedented and has been justified under the First Amendment because of the scarcity caused by the physical limitations of the electromagnetic spectrum. The need for some regulation of the airwaves became clear in the 1920's when there was none. "With everybody on the air, nobody could be heard." *National Broadcasting Co. v. F.C.C.*, 319 U.S. 190, 212, 63 S.Ct. 997, 1008, 87 L.Ed. 1344 (1943). In order to ensure the public's ability to hear some speakers, the rights of other potential speakers were curtailed. The hard choice was between forcing free speech to bend or watching it break.

The licensing scheme was based on antitrust policies as well. It was feared that the conditions of scarcity would make

broadcasting a natural monopoly so as to silence a diversity of opinion.[25] "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137, 60 S.Ct. 437, 439, 84 L.Ed. 656 (1940).

[9–12] The Commission has recognized that a policy of diversity is central to the Communications Act,[26] and it has denied

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25. *See, e. g.*, Remarks of Senator Howell, during debates on Radio Act of 1927, the predecessor act to the current Communications Act. 67 Cong.Rec. at 12503 (1926).

26. *See* 47 C.F.R. §§ 73–131–.138; .231–.240; .35; .658; 636 (1974); *Frontier Broadcasting Co.*, 27 F.C.C.2d 486 (1971). n*See also United States v. Midwest Video Corp.*, 406 U.S. 649, 665–670, 92 S.Ct. 1860, 1869–1871, 32 L.Ed.2d 390 (1972); *Metropolitan Television Co. v. FCC*, 110 U.S. App.D.C. 133, 289 F.2d 874 (1961); *Carter Mountain Transmission Corp. v. FCC*, 116 U.S.App. D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951, 84 S.Ct. 442, 11 L.Ed.2d 312 (1963); *Carroll Broadcasting Co. v. FCC*, 103 U.S.App.D.C. 346, 258 F.2d 440 (1958); *Simmons v. FCC*, 83 U.S.App.D.C. 262, 169 F.2d 670, *cert. denied*, 335 U.S. 846, 69 S.Ct. 67, 93 L.Ed. 396 (1948);

[footnote continued]

FN. 26, Con't.:

Chicagoland TV Co., 11 F.C.C.2d 119, 136–137 (1967) (Hearing Exam.); *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C. C.2d 393, 394–396 (1965). Note, Diversification and the Public Interest: Administrative Responsibility of the FCC, 66 Yale L.J. 476 (1957).

It is judicially settled that the Commission may, indeed must, consider diversification of ownership in the licensing of broadcast frequencies. *Citizens TV Protest Comm. v. FCC*, 122 U.S.App.D.C. 50, 348 F.2d 56 (1965); *Clarksburg Publishing Co. v. FCC*, 96 U.S.App. D.C 211, 225 F.2d 511 (1955). *See United States v. Midwest Video Corp.*, 406 U.S. 649, 665–670, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972); *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956); *Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971); *Mansfield Journal Co. v. FCC*, 86 U.S.App.D.C. 102, 180 F.2d 28 (1950). *See also Pinellas Broadcasting Co. v. FCC*, 97 U.S.App. D.C. 236, 241, 230 F.2d 204, 209, *cert. denied*, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956) (Bazelon, J., dissenting); *Scripps-Howard Radio v. FCC*, 89 U.S.App.D.C. 13, 189 F.2d 677, *cert. denied*, 342 U.S. 830, 72 S.Ct. 55, 96 L.Ed. 628 (1951).

Unfortunately, the Commission has not always pursued its diversification policy with un-

[footnote continued]

[949] licenses to otherwise qualified applicants on the strength of that policy.[27] Since denying access to the airwaves to some involves a substantial though at this time necessary, restriction of speech, it follows that the Commission acts properly when it attempts to promote diversity by allocating stations

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relenting vigor. *See Pinellas Broadcasting Co. v. FCC*, 97 U.S.App.D.C. 236, 251, 230 F.2d 204, 209, *cert. denied*, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956) (Bazelon, J., dissenting) H. Friendly, The Federal Administrative Agencies 66–67 (1962); Schwartz, Comparative Television and the Chancellor's Foot, 47 Geo.I.J. 655, 673–678, 690–694 (1959); *see also* H. Geller, A. Modest Proposal to Reform the Federal Communications Commission 3–12 (Rand Corp. 1974) (describing FCC policy on development of UHF and VHF bands). In addition, its inability to forestall trafficking in licenses has at times rendered diversification an empty gesture. *See generally Crowder v. FCC*, 130 U.S. App.D.C. 198, 201–202, 399 F.2d 569, 572–573, *cert. denied*, 393 U.S. 962, 89 S.Ct. 400, 21 L.Ed.2d 375 (1968), *aff'g Harriman Broadcasting Co.*, 9 F.C.C.2d 731 (1967); 47 C.F.R. § 1.597 (1973); *Moline Television Corp.*, 31 F.C.C.2d 263, 297–298 (1971) (Johnson, Comm'r., dissenting).

27. *E. g., McClatchy Broadcasting Co. v. F.C.C.*, 99 U.S.App.D.C. 195, 239 F.2d 15 (1956), *cert. denied*, 353 U.S. 918, 77 S.Ct. 664, 1 L.Ed.2d 665 (1957).

to those without control over an alternative major media voice. The Supreme Court has given its approval to a diversity policy based on First Amendment and antitrust considerations. The First Amendment "rest on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1944).[28] "The 'public interest' standard necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122, 93 S.Ct. 2080, 2096, 36 L.Ed.2d 772 (1972). In addition, even though the Commission does not enforce the antitrust laws, the Court has said the Commission may call on antitrust policies to promote diversity in giving content to the "public

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28. Although this statement was not made in a case reviewing FCC regulations, the Commission properly relied on it as support for its diversification policy. *Order* at 1050. The Court has referred to that language with approval in subsequent cases involving Commission regulations. *E. g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1968).

interest, convenience and necessity." *United States v. Radio Corporation of America*, 358 U.S. 334, 351, 79 S.Ct. 457, 467, 3 L.Ed.2d 354 (1958).

[13, 14] Nevertheless there are limits to diversification policy.[29] One limitation is contained in the statutory and First Amendment commands that the Commission shall not censor.[30] The Supreme Court upheld the personal attack and political editorializing portions of the Commission's fairness doctrine in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1968). Those rules were designed to invigorate public debate by requiring broadcasters to air responses to its
[950] programming in certain circumstances. The purpose of the rules is salutary.

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.

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29. Apart from those suggested in the text, any regulation must be able to withstand rational basis scrutiny.

30. 47 U.S.C. § 326 (1970).

395 U.S. at 390, 89 S.Ct. at 1806.

Nevertheless, the fairness doctrine may well mark the outer limits of a permissible diversification policy which relies on direct government control over the content of broadcast programs.[31] The *Red Lion* Court

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31. Another limitation is contained in the factual predicate for licensing—scarcity. At present, in many cities the available broadcast spectrum is fully occupied. *See, e. g., Red Lion, supra*, 395 U.S. at 398 n. 25, 89 S.Ct. 1794. However, currently available technology could eliminate this scarcity. With existing equipment and technology "a single coaxial (tv) cable can carry between 28 and 36 channels of television, plus the entire AM and FM radio bands and a quantity of other nonvisual electronic signals." Smith, *The Wired Nation* 7 (1972). And in ten years it may be possible to provide each home with as many as 400 cable channels. *Id.* An innovation developed by the Bell System offers even more promise than conventional cable service. Developed primarily for telephone service, so-called "lightguides" made of broadband fiber optics have a capability of carrying 50,000 telephone calls or their equivalent on a cable one-half inch in diameter. One cable operator has begun experimental use of lightguides for television transmission, reportedly with excellent results. Broadcasting, July 19, 1976, 44.

Alleviating scarcity would not only eliminate the need for promoting diversity, it would also

[footnote continued]

carefully withheld approval from rules that would more directly interfere with the broadcaster's First Amendment rights, such as one restricting a broadcaster from airing its own views. 395 U.S. at 367, 89 S.Ct. 1794.[32]

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presumably eliminate the need for all licensing save that necessary to prevent interference. Of course, the expense required to produce quality programming and lay cable may limit the number of voices that in fact reach each home, but such constraints are common to many businesses. Broadcasting would no longer present unique problems requiring unique regulation. This conclusion to some extent assumes, however, as the Ninth Circuit has suggested, *ACLU v. FCC*, 523 F.2d 1344, 1351 (1975), that the Commission can compel cable systems to be common carriers, a matter which is not, of course, before us. *See also United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972). In any event, these hopes for the future do not diminish the importance of encouraging diversity today. This footnote reflects the views of only the author of this opinion.

32. Such a statute might be proposed to promote public debate. One way to attempt to equalize debate is by boosting the power of the weaker voice; another way is by reducing the power of the dominant one.

[15] In any event, the Constitutional difficulties with promoting diversity through speech restrictive means highlight the virtue of the prospective cross-ownership rules. The prospective ban is an attempt to promote diversity without government regulation of or supervision over speech. The rules attempt to promote vigorous public debate not by imposing restrictions on broadcasters, but simply by permitting more to be heard. Of course, there is no guarantee that the prospective ban will increase diversity in all cases, "the possible benefits of competition do not lend themselves to detailed forecast." *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 96, 73 S.Ct. 998, 1005, 97 L.Ed. 1470 (1952). But that does not make the attempt irrational.[33]

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33. We also reject the argument that the prospective ban is arbitrary because it is based on one factor to the exclusion of others customarily relied on by the Commission. Courts are ordinarily uncomfortable with a claim that the "public interest" can be determined by reference to one, and only one factor. Here, however, the Commission has explained why it considers diversity to be a factor of exceptional importance and has anchored that explanation

[footnote continued]

It is not unreasonable for the Commission to assume that the licensing of an independent, rather than an affiliated station, offers greater hope of providing the community a new voice and to incorporate that assessment in its licensing policy. The First Amendment seeks to further the
[951] "search for truth." Surely that search will be facilitated by government policy that encourages the maximum numbers of searchers.

B. *Whether the Prospective Ban Exceeds the Commission's Authority*

[16] The prospective rules, it is argued, cannot stand because, apart from their rationality, the Commission lacks authority to promulgate rules that restrict ownership of broadcast stations by newspapers. We hold that the prospective ban is within the Commission's rulemaking authority.

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to Supreme Court decisions. Furthermore, forbidding the Commission from reasonably relying exclusively on one factor would prevent the Commission from enacting license qualifications, although it clearly has power to do so. *Storer Broadcasting, supra*; *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955).

[17] Although no provision of the Communications Act expressly grants the Commission authority to restrict newspaper ownership of broadcast stations, such express authority is not essential to the validity of Commission regulations.[34] 47 U.S.C. § 309(a) requires the Commission to find the "public interest, convenience and necessity will be served" by the grant of a license. 47 U.S.C. § 303(r) grants the Commission authority to make such rules and regulations "not inconsistent with law, as may be necessary to carry out" the Act while 47 U.S.C. 154(i) grants rule-making authority to make rules "as may be necessary in the execution of [the Commission's functions]."[35] In *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1955), the Supreme Court upheld a portion of the Commission's multiple ownership rules promulgated under these provisions.[36] In essence, *Storer* per-

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34. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1967).

35. In addition, the Commission cited 47 U.S.C. § 152(a), and 154(j) in support of the regulations.

36. The regulations upheld in *Storer* placed a numerical ceiling on the number of broadcast stations a party could control.

mits the Commission to codify in rule its understanding, if reasonable, of the public interest licensing standard. (*See* 351 U.S. at 202–03, 76 S.Ct. 763). Here, the Commission has determined the public interest would not be served by granting broadcast licenses to newspapers and in Section II–A we held this policy was reasonable. It requires no extension of *Storer* to conclude the Commission possessed statutory authority to impose the prospective ban.[37]

[18–20] *Storer* aside, ANPA contends the Commission is disabled from enacting this rule because the Commission's first general counsel, Hampson Gary, was of the opinion that the Commission lacks the requisite statutory authority. In rejecting this contention, we need not determine what

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37. The vitality of *Storer* is attested by its application in *FPC v. Texaco*, 377 U.S. 33, 39, 84 S.Ct. 1105, 1109, 12 L.Ed.2d 112 (1964), where the Court stated:

> [T]he statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.

weight should be given to an agency's initial interpretation of its mandate[38] because Mr. Gary did not conclude that the Commission lacks statutory authority to enact a regulation restricting newspaper ownership. The question Mr. Gary addressed was whether "the Commission may deny an application of a newspaper for a *license* on the ground that it is against 'public policy.'"[39] After distinguishing "public policy" from the statutory standard of "public interest, convenience and necessity,[40]" he concluded that a license could not be denied on public

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38. *See generally*, 1 *K. Davis, Administrative Law Treatise*, § 506 (1958), (1970 Supp.).

39. Legal Opinion of FCC General Counsel Hampson Gary submitted to the Senate Interstate Commerce Committee, Jan. 25, 1937, at 1, J.A. 239 (emphasis added).

40. Mr. Gary defined "public policy" as:

> a term of vague and uncertain meaning, which it pertains to the law-making body to define, and courts are apt to encroach on the domain of that branch of government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. *Smith v. San Francisco & N.P.R. Co.*, 115 Cal. 584, 47 P. 582, 587 (1897).

[952] policy grounds but that newspaper ownership could bear on the public interest. Mr. Gary did not consider, as would be relevant here, whether the Commission may enact license qualifications in the public interest.[41]

41. ANPA also argues Congress has affirmatively declared the Commission lacks authority to ban newspaper ownership of broadcast stations. Between 1946 and 1952 Congress considered legislation that would have prevented the Commission from barring per se license applications from newspapers. Congress failed to enact the legislation, ANPA submits, because it believed the Commission lacked the authority in question so that the legislation would have been unnecessary.

Although this recitation of legislative history is less than persuasive, *see Order* at 56, we reject this argument on broader grounds. As the Supreme Court recognized in *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 1358, 8 L.Ed.2d 590 (1961), the history of subsequent legislative activity is not useful in determining the meaning of the original legislation when enacted. "Statutes are construed by the courts with reference to the circumstances existing at the time of passage." *Id.* Otherwise, the meaning of a statute might never be settled, even though the statutory language had never been changed or reenacted with a different intent. Nor do the rules under review involve regulation of an industry over which the Commission lacks jurisdiction. The prospective ban simply imposes qualifications for broadcast licensees. It does not impose regulations on the conduct of the newspaper industry.

A more substantial argument is that this court already has decided the Commission lacks authority to restrict newspaper ownership of broadcast stations. The case relied on most strongly is *Stahlman v. F.C.C.*, 75 U.S.App.D.C. 176, 126 F.2d 124 (1942),[42] where after holding that an F.C.C. subpoena was supported by the Commission's general investigative powers, the Court wrote:

> [The Commission's power] does not embrace and should not be extended by implication to embrace a ban on newspapers as such . . . . This, we think, would be in total contravention of that equality of right and opportunity which Congress has meticulously written into the Act . . . .

126 F.2d at 127.

Although this language appears to resolve the question of statutory authority, in fact it does not. First, since the Commission

42. One pre-*Stahlman* case was also relied on. In *Tri-State Broadcasting Co. v. FCC*, 68 U.S. App.D.C. 292, 96 F.2d 564 (1938), the court wrote it knew of no rule or statute prohibiting a newspaper from owning a radio station. As the Commission stated in its *Order*, "We fail to see how this justifies a ban on promulgating such a rule." *Order* at 1051.

had not then enacted a rule restricting broadcast ownership by newspapers, the issue of statutory authority was not before the court. Consequently, as Judge Edgerton pointed out in his separate concurrence, the quoted language is dicta. 126 F.2d at 128.

More significantly, the premise of the paragraph containing the quoted language is that "[t]he Communications Act requires no more of an applicant for a radio license than proof of citizenship, character, and financial and technical qualifications to operate in the public interest." *Id.* at 127. The next sentence implies that any applicant meeting these qualifications must be granted a frequency if one is available. However, this view of the Commission as a "traffic cop" of the airwaves was rejected by the Supreme Court the next year in *National Broadcasting Co., supra*. In order "to secure the maximum benefits of radio to all the people of the United States . . . Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio." 319 U.S. at 217, 63 S.Ct. at 1010. Thus *Stahlman* was based on a reading of

the Communications Act that has not prevailed.[43]

In sum, *Storer* supports the Commission's exercise of rulemaking power and none of the materials cited requires a different conclusion.

[953] C. *Whether the Prospective Ban Violates the First Amendment*

[21–23] It is argued that the prospective ban unconstitutionally conditions the First Amendment right to publish a newspaper.[44]

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43. *Stahlman* was cited with approval in *McClatchy Broadcasting Co. v. FCC*, 99 U.S. App.D.C. 195, 239 F.2d 15 (1956), *cert. denied*, 353 U.S. 918, 77 S.Ct. 664, 1 L.Ed.2d 665 (1957), where the court held the Commission could attach decisive significance to media diversification in a comparative renewal hearing where the applicants were indistinguishable on the basis of the Commission's other comparative criteria. The court did not consider whether the Commission could, *if it chose to*, base a rule exclusively on diversification.

44. It was also argued in the briefs that the prospective ban violates equal protection. This argument was based primarily on *Morey v. Dowd*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957), which was overruled between filing of the briefs and argument, *City of New*

[footnote continued]

It is not argued, as indeed it could not be, that the ban violates the First Amendment rights of newspaper owners as would-be broadcasters. Denial of a license application does not abridge the applicant's First Amendment rights. *F.R.C. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166 (1933), *National Broadcasting, supra*, 319 U.S. at 226, 63 S.Ct. 997. "No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Red Lion supra*, 395 U.S. at 389, 89 S.Ct. at 1806, quoting *National Broadcasting*, 319 U.S. at 227, 63 S.Ct. 997. Of course, it does not follow that the First Amendment has no role in the licensing system. The Commission may not use the licensing process as a censoring mechanism,

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Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511. At argument, counsel noted this fact and evidently abandoned the equal protection argument. In any event, we see no merit in it. As explained in Section II–A, *supra*, there is a rational basis for the rule, and, as this section makes clear, strict scrutiny is not required because the ban does not trench on protected First Amendment interests.

choosing those applicants whose views it favors.

> Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views . . . If it did, or if the Commission by these Regulations proposed a choice among applicants on some such basis, the [First Amendment] issue before us would be wholly different.[45]

National Broadcasting, 319 U.S. at 226, 63 S.Ct. at 1014. But no claim of censorship can be made here. The Commission has only decided that the public interest is better served by assigning available broadcast frequencies to those without a co-located major media voice.

[24] Freedom of the press does not necessarily shield newspaper publishers from regulation that may make publication more difficult. A newspaper could not, for example, plausibly claim the federal income tax violates the First Amendment because

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45. *See also*, 47 U.S.C. § 326; *Red Lion*, 395 U.S. at 390, 89 S.Ct. 1794; *Brandywine-Main Line Radio v. FCC*, 153 U.S.App.D.C. 305, 473 F.2d 16, 63 (Bazelon, C. J., dissenting); Kalven, *Broadcasting and the First Amendment*, 10 J. Law & Econ. 15, 43–44.

payment of the tax makes publication more difficult, or perhaps impossible. *See Associated Press v. United States, supra.* So the question presented is not whether the prospective ban burdens newspapers—it clearly may do so—but rather whether there is something special about the burden that renders it unconstitutional. The relevant case law does not support such a contention.

In *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), the Supreme Court held unconstitutional a state tax on net receipts imposed only on newspapers with weekly circulations of over 20,000. Justice Sutherland, writing for the Court, likened the tax to those imposed by the British on the American colonies in order to suppress dissent. *Id.* at 246–49, 56 S.Ct. 444. The tax was bad, he wrote because it was "a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled." *Id.* at 250, 56 S.Ct. at 449. Here, the purpose of the Commission's prospective regulation is precisely the opposite.[46] The

46. *Grosjean* may be a shaky precedent because it seemingly calls for judicial inquiry into the legislature's intent. *United States v. O'Brien*,

[footnote continued]

rule is intended and reasonably designed to increase the diversity of information and opinion circulated by increasing the number
[954] of media voices in the community. Neither *Grosjean* nor the other cited cases are controlling.[47]

391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1967). This is less difficult with respect to agency regulations because agencies must provide a statement of the regulation's purpose. 5 U.S.C. § 554(c).

47. *Oklahoma Press Publ. Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1945), is mistakenly cited for the proposition that legislation can never single out newspapers for special treatment. In fact, that issue was never reached. The case held, largely on the authority of *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), that the Fair Labor Standards Act could be applied to any business, including newspapers. After noting the First Amendment does not forbid regulations which do not restrain expression, the Court said the case did not involve the issue of special treatment raised in *Grosjean*. And an argument based on *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), also fails. *Speiser* involved a statute that conditioned a property tax exemption on the signing of a loyalty oath. The statute was invalidated not because it conditioned the exemption on the oath, but because the oath proscribed constitutionally protected speech.

[footnote continued]

[25, 26] The ANPA admonishes us to heed the warning uttered by the Supreme Court in *Miami Publishing Co. v. Tornillo*, 418 U.S. 241, 256, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974);

> Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitation . . . *Id.* at 256, 94 S.Ct. at 2839.

However, a restraint is not unconstitutional merely because it is unfamiliar. Unable to claim the ban violates their First Amendment rights as would-be broadcasters, petitioners have not demonstrated the ban trenches on the constitutionally protected interests of newspaper publishers.[48] The

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This was held to be a penalty for engaging in free speech. The prospective ban, however, does not regulate let alone punish any speech and thus is not invalid under *Speiser*.

48. The principle of least restrictive alternatives, it is also argued, precludes the Commission from imposing a flat ban on future combinations. This argument contains a useful insight, but misapplies it. Systematic licensing of speakers itself severely strains free speech. Thus it is entirely appropriate for the Commission to attempt to restrict the access of the smallest possible number. Arguments that the ban is an unconstitutional prior restraint or overbroad are also unpersuasive.

ban neither mandates nor prohibits what may be published. It only forbids the formation of co-located combinations the Commission has determined do not serve the public interest. Of course, in serving the public interest the ban may indirectly affect the economics of publication, but the First Amendment does not provide a shield against this. *Associated Press*, 326 U.S. at 20, 65 S.Ct. 1416.

In fact, the very claim of constitutional abridgement is ironic. First of all, the prospective ban is an attempt to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech. Second, it may be that newspapers can not truly be free of government interference so long as they operate government licensed broadcast stations. An unsavory fact of life is that government has the power to regulate expression by a "raised eyebrow" reminding the broadcaster of the triennial government renewal process. A newspaper opens itself up to similar intimidation by affiliation with a broadcast station.[49] "It would be

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49. "The main, main thing is The Post is going to have damnable, damnable problems out of

[footnote continued]

strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . ." *Associated Press*, 326 U.S. at 20, 65 S.Ct. at 1424.

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In conclusion, we affirm the validity of the prospective ban. We find that the ban is a rational attempt to promote the highly valued goal of diversity, that it is within the Commission's authority and that it does not violate the Constitution. We now turn to the issues regarding the Commission's treatment of existing combinations. How-
[955] ever, before considering whether the divestiture scheme actually ordered by the Commission can be upheld, we must evaluate the arguments that the Commission may not enact any rule that orders divestiture without an evidentiary hearing.

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this one. They have a television station . . . . . And they're going to have to get it renewed." Taped Statement of Richard Nixon to H. R. Haldeman and John Dean, Sept. 15, 1972, quoted in Senate Select Comm. on Presidential Campaign Activities, Final Report. S.Rep.No.981, 93d Cong., 2d Sess. 149 (1974).

III. WHETHER THE COMMISSION MAY ADOPT ANY RULE THAT ORDERS DIVESTITURE WITHOUT AN EVIDENTIARY HEARING

[27] From the premise that divestiture, as retroactive legislation, is inherently suspect, it is argued that divestiture is permissible only if Congress specifically intended for the Commission to enact retroactive rules and only where, quoting from the *Order* at 1083, "the need is overwhelming and the evidence is unambiguous."[50] This argument fails in light of *American Airlines, Inc. v. Civil Aeronautics Board*, 123 U.S.App.D.C. 310, 359 F.2d 624 (1966),

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50. This argument is made even though past divestiture orders have been approved under ordinary standards of review. In addition to the divestiture ordered as a result of the multiple ownership rules enacted in the 1940's, *see* text and notes at notes 6–7, *supra*, the Commission has adopted rules prohibiting networks from having cable interests and telephone companies from owning cable systems in their service areas. In *Iacopi v. FCC*, 451 F.2d 1142, at 1147 (9 Cir. 1971), the Ninth Circuit discussed the network cable divestiture rule with approval and in *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5 Cir. 1971), the Fifth Circuit affirmed the telephone cable divestiture rule.

where in upholding CAB regulations that affected existing licenses, this court en banc rejected an argument "that the *Storer* doctrine is restricted to regulations affecting applications for new licenses or certificates . . . ." *Id.* at 628. The court said "such rule making is not to be shackled, in the absence of clear and specific Congressional requirement." *Id.* at 629. Authority to order divestiture follows not only from the fact that *American Airlines* is based on *Storer Broadcasting*, which interpreted the Communications Act, but also from the fact that the interest in a broadcast license is limited and conditional. A licensee must apply for renewal of authority every three years, and the renewal application is subject to such rules and conditions as are in effect, not during the license period, but at the time of the renewal. *Transcontinent Television Corp. v. F.C.C.*, 113 U.S.App.D.C. 384, 308 F.2d 339 (1962). Consequently, the contention that divestiture contains elements common to suspect retroactive legislation goes not to the existence of Commission authority, but rather to the reasonableness of its exercise.[51]

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51. It may be that Commission licensing rules are valid only if they contain waiver provisions.

[footnote continued]

Section 309(e) of the Act, 47 U.S.C. § 309(e), requires the Commission to grant an applicant a hearing if unable to make the public interest finding required to grant a license. NAB advances the argument, seemingly foreclosed by *Storer* and *National Broadcasting*, that a divestiture rule violates the statutory right to a hearing. Although it is not entirely clear, the basis of this argument appears to be that *Storer* and *National Broadcasting* apply only to potential licensees not existing ones. However, as *American Airlines* suggests, these cases are not dependent on a distinction between current and potential licensees and nothing presented to us suggests why this distinc-

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In *Storer* the Court quoted with approval language from *National Broadcasting* that "The Commission provided that 'networks will be given full opportunity, on proper application . . ., to call to our attention any reasons why the principle should be modified or held inapplicable.'" 351 U.S. at 205, 76 S.Ct. at 771, quoted 319 U.S. at 207, 63 S.Ct. 997. It is not clear whether the Court saw the waiver provision as necessary for affirmance or simply as evidence of reasonableness. In any event, there is every reason to believe that any divestiture order of the Commission will be accompanied by an appropriate waiver provision.

tion should be read into them.[52] Further-
[956] more, divestiture would not be as harsh as denial of license renewal. A licensee facing divestiture is compensated for its loss. A licensee that fails of renewal is not.

While recognizing that the Commission has broad discretion to proceed by rulemaking or adjudication, and that it may affect the rights of individual licensees without first holding an evidentiary hearing, Gray Broadcasting argues that the Commission abused its discretion by ordering divestiture without affording affected parties a prior evidentiary hearing. Gray contends the Commission has couched as rulemaking a proceeding that in "substance and effect is

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52. This Court's decision in *Citizens Communication Center v. FCC*, 145 U.S.App.D.C. 32, 447 F.2d 1201 (1971) does not forbid the Commission from ever denying a license without a hearing. In *Citizens*, the Commission's policy statement on comparative hearings was invalidated because it improperly denied a full hearing to qualified license challengers. The *Citizens* court carefully distinguished its disapproval of a policy of denying hearings to qualified applicants from *Storer's* approval of denying hearings to unqualified applicants. 447 F.2d at 1212, n. 34. As Section II makes clear, it is reasonable for the Commission to consider newspapers as "unqualified" to acquire licenses in the city of publication.

individual in impact," in other words an adjudication. The APA defines rule as "any agency statement of general *or particular applicability* and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 501(c). Professor Davis points out that the words "or particular" were inserted after Senate passage "to assure coverage of rule making to named persons." *Davis*, 7 *Administrative Law* § 5.02 (1958). The nature of the evidence required to implement a rule, and not the particularity of application, determines the necessity for individualized hearings. Given our disposition of the case, however, we need not determine whether a divestiture order limited to the seven affected licensees could have been implemented without individualized hearings.[53]

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53. Implementation of certain divestiture rules might require individual evidentiary hearings. If, for example, the Commission were to adopt on remand a policy of requiring divestiture where combinations have over 30% of the market in the community of operation, it would presumably be necessary to determine the market shares of given combinations by hearing. Across-the-board divestiture could, on the other hand, be implemented without hearings, apart from waiver proceedings.

[28] In sum, the Commission has authority to promulgate a rule that orders divestiture. An altogether different question, to which we now turn, is the reasonableness of the scheme under review.

IV. VALIDITY OF THE DIVESTITURE RULE ADOPTED BY THE COMMISSION

[29, 30] Since the Commission purported to limit divestiture to "egregious cases" of "effective monopoly," we must examine the record support for this determination. *Greater Boston Television Corp. v. F.C.C.*, 143 U.S.App.D.C. 383, 444 F.2d 841, 850 (1970). The purpose of our review is only to determine whether the agency decision is rational and based on consideration of the relevant factors, *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 146, 91 S.Ct. 814; *Bowman Transportation v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); whether, in terms of the APA, the agency decision is arbitrary and capricious. 5 U.S.C. § 706(2)(A). Technically, there is no requirement that the rules be based on substantial evidence. Cf. 5 U.S.C. § 706(2)(E). Nevertheless, a decision must be considered

"arbitrary and capricious" if the facts on which it is purportedly based are not supported by the record. *Associated Industries of New York State, Inc. v. U. S. Dept. of Labor*, 487 F.2d 342, 349–50 (2d Cir. 1973) (Friendly, J.). Factual certainty is not necessary, though. An agency may regulate even though the facts do not illuminate a clear path. *Ethyl Corporation v. EPA*, 176 U.S.App.D.C. 373, 541 F.2d 1 (1976). But it stands to reason that presumptions derived from the enabling statute and fundamental national policies take on redoubled importance where this is so.

A. *Record Support for the Divestiture Order*

The voluminous record of the lengthy rulemaking proceeding contains little reliable "hard" information. Many filings are devoted to legal argument or representations that the editorial staff of the filer's newspaper and television station are inter-
[957] nally segregated. In addition, roughly twenty-five major studies were submitted.[54]

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54. *See Order* at 1093–94 for a listing.

However, as the Commission brief points out, the studies were largely inconclusive. Br. at p. 9.

We summarize the record only to the extent necessary to show that in determining its divestiture policy, the Commission necessarily had to rely primarily on policy, not factual considerations.[55]

(1) Effect of Common Ownership on Station Performance

Several studies attempt to demonstrate either that newspaper ownership of television stations has not harmed the public interest or, affirmatively, that newspapers have been superior broadcast licensees. The Anderson study [56] is largely of the former variety. It attempts to compare patterns of content under different ownership conditions to determine if cross-ownership produces "repressive information control," evidently on the assumption that the pur-

55. We follow the Commission's categorization, even though, as the Commission recognized, the categories overlap. *Order* at 1072–73.

56. J. Anderson, Broadcast Stations and Newspapers: The Problem of Information Control: A Content Analysis of Local News Presentation, filed July 2, 1971, also published in J. Broadcasting 51 (1971).

pose of diversity policy is to combat such repression. The study finds no significant difference in content between individually and cross-owned stations in the sample cities and concludes divestiture is unnecessary.[57] Although the study has an objective format, it is based on content analysis that necessarily entails subjective judgments.[58]

The Litwin and Wroth study,[59] commissioned by the NAB, compares media per-

57. *Id.* at 44–45. The study also finds that cross-owned television stations depend less heavily than individually owned stations on wire services for their stories. On this basis it concludes "newspaper-allied stations appear to be better recommended." *Id.* at 46. One commentator, however, suggests this phenomenon might be due to the fact that cross-owned stations rely heavily on their sister newspapers for information. Barnett, A Critique of, and Supplement to, the Prospective Reports of the Rand Corporation at 7 (Sept. 23, 1974).

58. Cox Broadcasting submitted studies similar to Anderson's dealing with markets in which it operates. W. McDougal & E. Sasser, Atlanta Market News and Editorial Research Study; J. Anderson & D. C. McDaniel, Two Studies: A Historical Analysis and A Content Comparison for Cox Broadcasting Corporation's Affiliated News Media in Dayton, Ohio (May 17, 1971).

59. G. Litwin & W. Wroth, The Effects of Common Ownership on Media Content and Influence (Aug. 4, 1969).

formances in highly concentrated and relatively unconcentrated cities. Relying on information acquired in interviews, it finds that cross-owned stations are perceived to provide greater amounts of news coverage in greater depth than individually owned stations. In part, it attributes this superiority to greater financial stability. However, the interviewers only polled high-ranking "media personnel" and "business and community leaders."[60] Furthermore, the difficulties with an approach based on popular perceptions is highlighted by the fact that the study reports a pervasive history of news distortion and bias in one of the three highly concentrated cities examined.[61]

The Commission undertook a study[62] that compares the performance of cross and individually owned stations, but without making judgments based on content analysis. A complex multiple regression analysis finds that cross-owned stations present "6%

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60. *Id.* at 1-1 to 1-2, 4-4.

61. *Id.* at 2-9.

62. *Order* at 1094 *et seq.*, appendix C.

more local news, 9% more local non-entertainment, and 12% more total local including entertainment than do other TV stations." This study, the *Order* concludes, shows "an undramatic but nonetheless statistically significant superiority in newspaper owned television station in a number of program particulars." *Order* at 1078 n. 26. However, the Commission did not stress this superiority in deciding to grandfather most stations. Comparing amounts of programming types aired, not only requires qualitative judgments in categorizing the programs, but would also seem to be a
[958] crude measure of the public interest. More broadly, as Commissioner Robinson asserted in his dissent, it is inconsistent for newspapers to assert that they make superior broadcasters while at the same time claiming that their affiliated stations are totally independent. *Order* at 1119.

An empirical study which employed data drawn from the Commission's files attempts to determine if cross-owned stations differ from other stations in the amounts of news and other public interest programming they

air.[63] According to the Commission, this study finds "no significant differences." A study by Harvey Levin[64] reaches the opposite conclusion. He finds that individually owned stations "systematically outclass" affiliated stations in their levels of public interest programming. However, several filings severely criticize Levin's methodology[65] and, although he later attempted to correct the deficiencies,[66] the Commission termed his results "inconclusive." *Order* at 1073.

Finally, the American Institute conducted a study to determine whether cross-ownership affects the level of public knowledge.[67]

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63. Comment of Students' FCC Study Group (May 17, 1971).

64. H. J. Levin, The Policy of Joint Ownership of Newspaper and TV Stations: Some Assumptions, Objectives and Effects (April 12, 1971).

65. National Association of Broadcasters Reply Comments and Arguments on the Proposed Rules, Appendices B, C and D (August 18, 1971).

66. H. Levin, Research Memorandum on the Economic and Programming Effects of Newspaper Ownership of Television Stations, Supplementary Comments at 4 (May 15, 1974).

67. American Institute for Political Communications, Washington, D.C., 1971, The Effects of

[footnote continued]

It finds the public in Zanesville, Ohio, a town with media "monopoly," significantly less informed than the public of a "similar" city, York, Pennsylvania, a town with a competitive media. The Institute attributes this difference to media monopoly. It is possible, however, that factors other than media monopoly contribute to or explain the results. In fact, this study highlights the difficulty of attempting to compare the performances of cross-and independently-owned stations. As Commissioner Robinson observed in his dissent:

> We ought not to assume that the kind of "goodness" we really want in a station is measured simply by diversity among different program types, the relative percentage of situation comedies, news, public affairs and the like. On the other hand, it is about the only way we can get any kind of objective handle on program quality, without getting into the business of making subjective valuations of programming content, a course that, need-

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Local Media on the Mass Mind. This study was never officially filed, although the Commission discussed it in the *Order* at 1073.

less to say, raises grave First Amendment problems.

Order at 1121.

(2) Effect of Common Ownership on Competition

Comparing advertising rates provides the most ready means for determining whether cross-ownership in general has an anti-competitive effect. Rosse *et al.*[68] purport to find that newspaper-owned television stations charge advertising rates 15% higher than other stations, presumably due to their monopoly position. However, their calculations assume that audience size lacks explanatory value because it is a "dependent variable"; in other words, they assume that since advertising prices determine programming quality which in turn determines audience size, audience size cannot explain advertising rates.

In a NAB-commissioned study, Lago and Osborne challenge this assumption.[69] Em-

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68. J. Rosse, B. Owen & D. Gery, Economic Issues in Joint Ownership of Newspaper and TV Media (June 1, 1970).

69. A. M. Lago & D. P. Osborne, A Quantitative Analysis of the Price Effects of Joint Mass

[footnote continued]

ploying audience size as an explanatory variable in a regression analysis, this study finds no significant difference in advertis-
[959] ing rates. The Commission did not indicate which methodology it accepted; it merely noted that its own examinations failed to confirm Rosse's conclusion.[70] *Order* at 1073.

Apart from these studies, the Commission noted that the record did not contain evidence of specific anti-competitive acts by cross-owned stations. However, Stephen Barnett suggested before the Commission that such evidence—as well as evidence regarding the impact of cross-ownership on station performance—is available, though difficult to uncover.[71] Pointing to exam-

Communications Media Ownership, RMC Report UR–150–A (March 9, 1971).

70. The nature of this examination is not clear from the record.

71. S. Barnett, reply comments (August 19, 1971); S. Barnett, "Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary Markle Foundation" (Sept. 23, 1974). It is strenuously contended that the latter submission was not part of the administrative record and hence should not be considered on appeal. However, as much of the report consists of discussion of cases in the public record, we see no harm in taking notice of it.

ples from the Commission's cases, the Litwin and Wroth report[72] and other documented sources, Barnett described several instances where multiple-media owners had abused their power. Typical abuses were news suppression, news distortion and advertising discrimination that presumably would have been less feasible in a more competitive market.

The Commission did not mention these or other examples of abuses in its summary of the record,[73] although Commissioner Hooks noted that Barnett's position was supported by several other submissions. *Order* at 1109 (Hooks, Comm., concurring in part). The Commission's focus was on national trends, and it may have felt uncomfortable drawing conclusions about an entire industry from apparently isolated examples. However, former Commissioner Johnson has expressed the opinion that the majority of media abuses remain undiscovered. *In re National Broadcasting Co.*, 19 F.C.C.2d

72. *See* note 59 *supra*.

73. During the pendency of Docket 18110, the Commission deferred petitions to deny renewal applications alleging undue economic concentration. The Justice Department had filed several such petitions. *Order* at 1080, n.29.

713, 720–723 (dissenting opinion). In his view, this is caused by lack of written records, the difficulty of separating the elements of self-interest and news judgment, and the fact that station managers rarely resort to overt, documentable pressures.

(3) Multiplicity and Diversity of the Media

The record contains several studies designed to measure media diversity. Sterling's study reports that the proportion of newspaper-owned broadcast stations has declined since 1950.[74] However, it examines only the top 100 markets. Furthermore, it may understate the amount of current concentration. In gauging concentration, radio and television stations are equated even though the Commission had noted in its notice of proposed rulemaking that TV and newspapers are by far the most powerful media sources.[75] Thus the study would

74. C. H. Sterling, Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922–1967 (March 5, 1971).

75. 22 F.C.C.2d at 346. The Litwin-Wroth study, *supra* n. 59, was one study that reached this conclusion. *See also* studies cited at 22 F.C.C.2d at 344.

show that a town originally served only by a cross-owned television-newspaper combination had become significantly less concentrated by the addition of a radio station, even if the co-located combination remained the dominant voice. Udell's study reaches a conclusion similar to Sterling's. It finds that the percentage of newspaper-owned television stations dropped from 29% in 1955 to 14% in 1969.[76] This study may simply reflect, however, the fact that the number of broadcast outlets increased during this period while the number of newspapers decreased, a finding also made by Sterling.[77]

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76. J. Udell, Economic Consequences of FCC Proposal and Critique of Relevant Literature, submitted by the ANPA.

77. The NAB argues that it is unnecessary and hence arbitrary for the Commission to impose restrictions on affiliations since market forces are eliminating whatever problem exists. This position is unpersuasive. First, since none of the studies demonstrates why cross-ownership has declined, continuation of the trend cannot be confidently predicted. Consequently, there is no way to predict how long it will take for cross-ownership to finally die out. More importantly, there is no reason why the Commission cannot act to accelerate a natural trend.

[footnote continued]

[960] The Seiden study attempts to measure precisely the amount of diversity in communities throughout the country.[78] Choosing the Area of Dominant Influence[79] as the relevant geographic area instead of either the city, country or Standard Metropolitan Statistical Area, it counts the number of media competitors and owners that serve each area and finds that no area is served by less than thirty media owners.[80] However, the count includes numerous media that have little or no bearing on local diversity, such as newspapers from other cities

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And this argument has an ironic ring in light of the claims that divestiture would disrupt the continuity necessary for quality broadcasting.

78. N. H. Seiden & Associates, Mass Communications in the United States (Jan. 29, 1971).

79. The concept of the Area of Dominant Influence (ADI) was designed by the American Research Bureau to reflect advertising markets. Every county in the continental United States is assigned to one of 204 ADI's. Seiden, *supra* n.78, at 4. An ADI thus may encompass a large geographic area.

80. New York City showed 610 media outlets while Meridian, Mississippi, which the Commission characterized as an "egregious case," showed 109 media outlets.

and national magazines. The count contains other distortions as well. A television station and its satellites are treated as individual outlets even though they provide the same service. The Commission characterized this study as "totally unrealistic." *Order* at 1079, n.28.

In concluding its discussion of these studies, the Commission expressed doubt as to whether "counts" as such generated valuable knowledge. *Order* at 1074. Also, the Commission's brief disparages the conclusion of the Justice Department brief that the media is highly concentrated in many cities. In thirty Standard Metropolitan Statistic Areas (SMSAs) involved in this case, Justice observes, only one newspaper circulates. "In twenty others there are only two daily newspapers, and in eleven of these the newspaper which owns a television station has more than 75% of the SMSA's newspaper circulation. Computed from Rand Corporation Study R–1585–MF." And, Justice continues, "metropolitan areas which in theory have several newspapers, in practice usually have only one or two with significant circulation." Br. at 20. Such figures, the Commission points out, do not establish that the broadcast industry is anti-competitive.

(4) Economic Consequences of Divestiture

The economic consequences of divestiture involves two questions: the extent to which investors themselves will be injured and the extent to which this injury will be translated into public injury. Two major studies deal chiefly with the first question, none with the second.

Commissioned by the ANPA, the Frazer-Gross study [81] and the First National City Bank study [82] both suggest most combination owners will divest their television stations, at less than current value. In particular, Frazer estimates that under divestiture conditions, TV stations will sell at 10% to 20% less than true value. In response, Justice contends this conclusion is premised on the erroneous assumption that broadcast licensees do not compete in the investment market with other non-broadcast income-producing properties.[83] Furthermore, even

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81. Frazer, Gross Associates, Valuation of Newspaper Owned TV and Radio Stations.

82. First National City Bank, Financial and Investment Issues of Forced Divestiture.

83. Comments of the United States Department of Justice, pp. 32–33 (1971).

assuming the validity of Frazer's judgment, it does not follow that the sales price will not include a substantial profit margin.[84]

[961] Finally, since investment demand and license demand may fluctuate during the five year sale period, it is difficult to forecast loss figures accurately. The Commission concluded, "Our own evaluation is that the concern [over losses] may be exaggerated." *Order* at 1072.

No studies dealt with whether the public would be injured by the economic consequences of divestiture. Various comments, however, predict divestiture will produce harmful side-effects such as reductions in local ownership or the demise of marginally profitable newspapers contrary to the intent of the Newspaper Preservation Act.[85] Such suggestions are little more than speculations.[86]

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84. The Commission evidently assumed that the forced sales would be accomplished at a gain. The Commission offered to certify sales for special treatment under 26 U.S.C. § 1071, *Order* at 1025, n.45, a provision only applicable to gains.

85. P.L. 91–353, 84 Stat. 466 (1970).

86. *See* text and notes at notes 94–104 *infra*.

B. *Whether the Commission May Properly Require a Showing of Tangible Harm to Support Divestiture*

Putting aside for the moment the question whether the Commission abused its discretion in refusing to order divestiture absent a showing of tangible public interest harm, we first consider whether the Commission's evaluation of the record was reasonable.

Despite the fact that it did not systematically evaluate the record, the Commission evidently concluded that the factual case for broad-scale divestiture had not been made. At one point the *Order* implies that the Justice Department failed to demonstrate that cross-owned stations charged anti-competitive advertising rates, *Order* at 1079 n. 27, and later it observes "it might have been necessary . . . to require divestiture in many more situations if the power of the print-broadcast combination were exercised monolithically." *Order* at 1089. Also, after mentioning its power to act in the absence of documented abuses, the Commission nonetheless concluded that such "considerations are [not] a substitute for the requirement of a stronger showing

than we have of the need for such a severe remedy on a broad basis." *Order* at 1080, n.29.

Furthermore, the Commission reasonably could have concluded, as it evidently did, that a compelling factual showing was unlikely to be made. The Commission not only received roughly 200 original submissions, but, when dissatisfied with the substantially of these filings, there were 48 fresh filings in response to a detailed request. 45 F.C.C.2d 768. As a whole, the submissions suffered from what may have been unavoidable failings.[87] Diversity and its effects are, as Commissioner Robinson suggested, elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds. And the process suggested by Professor Barnett's filing did not offer much more hope of compiling a useful record. Former Commissioner Johnson has suggested that specific abuses of cross-ownership are unlikely

87. An antitrust rather than First Amendment focus might have facilitated compilation of a useful record. This does not, however, invalidate the Commission's chosen emphasis.

to be apparent. And, as Judge Tamm has explained elsewhere, documentation of such abuses, "would require not only program monitoring but also laborious perusal of reams of documentary evidence which will likely be dispersed, inaccessible and unintelligible to one who is not skilled in the intricacies of antitrust and communications law." *Hale v. FCC*, 138 U.S.App.D.C. 125, 425 F.2d 556, 565 (1970) (Tamm, J., concurring). Furthermore, the intrusiveness involved in the very process of attempting to uncover abuses—such as news distortion—might severely strain First Amendment values.

On the other hand, the *Order* does not emphasize that the record does not support the reasons adduced for grandfathering either. There is virtually no evidence regarding the likelihood that divestiture would
[962] produce the harmful effects feared, or how serious any such harm would be. And the record no more establishes that cross-ownership serves the public interest than injures it.[88] After years of study, the record

88. One attempt to assess statistical studies on the effects of media concentration concluded neither side in Docket 18110 had adduced suffi-

[footnote continued]

was essentially inconclusive.[89]

Had the evidence pointed strongly one way or another, the Commission probably would not have considered whether it should order divestiture absent a showing of tangible harm. Having concluded that the record was inconclusive, the Commission recognized that it nonetheless had the power to order divestiture. *Order* at 1080, n.29. Had the Commission reasoned that because diversified ownership is prima facie in the public interest, local cross-ownership violates the public interest, it would have been rational for it to conclude that divestiture was generally called for, subject to any appropriate exceptions. The Commission

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cient quantitative evidence to completely "prove" its case for harm or benefit. Bear, Geller, Grundfest & Posner, *Concentration of Mass Media Ownership* (RAND, Sept. 1974) at 79.

89. The Commission evidently shares this assessment. In its brief it observes that most of the studies were inconclusive. Br. at 9, n. 6. The firmest conclusion drawn by the Commission was that an "overwhelming need" for divestiture had not been shown. The Commission did not point to items in the record that supported its decision to grandfather most stations.

did not adopt this view, however.[90] "Divestiture," the Commission wrote, "is a harsh remedy, one to be reserved [sic] only where the need is overwhelming and the evidence unambiguous."[91] *Id.* at 1083. Thus the question before us is whether the Commission acted properly in refusing to order divestiture in the absence of a showing of tangible public interest harm.

[31] Having evaluated the policies and record presented to us, we hold that the

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90. The most natural reading of the Commission's *Order* is that the burden of persuasion was placed on the proponents of divestiture. A strained, though possible, reading is that the burden placed on the opponents was met by the mere existence of competing policies. However, as will be shown, *see* text and notes at notes 108–109 *infra*, the record contains no evidence anchoring the competing policies to the grandfathered combinations. Thus it would have been unreasonable to conclude the presumption against cross-affiliation had been met.

91. Although this premise, if valid, would have supported some form of limited divestiture, it would not have supported the limited divestiture actually ordered. That is because no evidence supports the line drawn by the Commission. *See* text and notes at notes 108–09 *infra*.

Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture. Divestiture, to begin with, is a misleading term in this context. It implies that the broadcaster has that which the Communications Act specifically states he does not have—an interest in the license beyond its expiration date—and that he is being forcibly deprived of a vested right. A licensee must apply for renewal of his license every three years and the Commission is to grant renewal only if it finds it is in the public interest to do so. 47 U.S.C. § 307(d).

With this in mind, it is easier to understand that even though divestiture is typically a remedy for misconduct, it is actually a much more flexible tool. Divestiture need not only be used to take the licenses from those who disserve the public interest. As with the Commission's early Chain Broadcasting and Multiple Ownership rules,[92] divestiture could be employed *to increase* the extent to which the broadcasting industry serves the public interest. As the Commission recognized, "it is unrealistic

92. *See* text and notes at notes 6–8 *supra*.

to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." *Order* at 1079–80. Although divestiture cannot guarantee greater diversity, it increases the likelihood that the public will be served by broadcasters with diverse views. Thus the Commission's obligation to "encourage the *larger* [963] and *more* effective use of radio in the public interest," 47 U.S.C. § 303(g) would support the presumption that cross-owned stations do not serve the public interest.

[32, 33] The policies of the First Amendment also support this presumption. Because the right of access to the airwaves of some would-be broadcasters has been restricted, the public is deprived of speakers it would otherwise hear. As a result, the Supreme Court has said "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion, supra*, 395 U.S. at 390, 89 S.Ct at 1806. And the interest of the public is presumed to be in maximum diversification of the airwaves. The First Amendment "presupposes that right conclusions are

more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all." *Associated Press v. United States*, 52 F.Supp. 362, 372 (D.C. 1943).

Finally, and perhaps most importantly, the Commission's long-standing policy has been that diversification of media sources is of central importance.[93] It reaffirmed this view throughout the proceeding under review. "If our democratic society is to function, *nothing* can be more important than insuring that there is a free flow of information from as many divergent sources as possible." *Order* at 1079 (emphasis added). Of course, the Commission probably did not intend for this and similar statements to be read literally. If it had, it presumably would not have allowed itself even to consider whether other policies ever called for waiver. But at the least, consistency would call for ordering divestiture absent a showing of greater public interest harm.

The Commission did not do this, however. Although purporting to reaffirm the prima-

93. *See* text and notes at notes 6–9 *supra*.

cy of diversity, *e. g.*, *Order* at 1078, the *Order* ultimately did not adopt the presumption that cross-ownership does not serve the public interest, divestiture only being ordered where "the need is overwhelming and the evidence unambiguous." *Order* at 1083. The Commission never explained that or why it had abandoned the presumption suggested in the notice of proposed rulemaking. It simply cited the existence of competing policies it claimed not to have previously considered.

The first competing value is preservation of local ownership and involvement of ownership in management. The Commission expressed fear that "many sales would have to be to outside interests." *Order* at 1078. However, as the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395–96 (1965), makes clear, local ownership by itself is of little concern to the Commission.[94] Owner management is sig-

94. Although by its terms the 1965 *Policy Statement* applies only to comparative renewal hearings, the Commission has regarded it as an expression of general policy. *See* note 9 *supra*.

See also, *Community Broadcasting Service, Inc. v. FCC*, 2 FCC2d 53 (Rev.Bd., 1966), *aff'd*,

[footnote continued]

nificant because it increases the likelihood that station policy will be attuned to local needs; local ownership by itself offers no such promise.[95] And even when both are present, they are not of primary importance to the Commission. A licensee may sell its license without regard to whether the new owner intends to participate actively in management. Br. of Justice Dept. at 39, F.C.C. Reply Br. at 19 n.15.

In addition, the record does not support the theory that divestiture will impair local ownership and management. The Justice Department asserts and the Commission does not deny that nineteen, or roughly one quarter of the 79 newspaper-television com-

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Community Broadcasting Service, Inc. v. FCC, 126 U.S.App.D.C. 258, 377 F.2d 143 (1967); *Mid-Florida Television Corp.*, 33 FCC2d 559 (Rev.Bd.), *aff'd* 37 FCC2d 559 (1972), *rev'd on other grounds*, *TV 9 Inc. v. FCC*, 161 U.S.App. D.C. 349, 495 F.2d 929 (1973), *cert. denied* 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974).

95. "We are primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." 1965 *Policy Statement*, *supra*, 1 FCC2d at 395.

[964] binations at issue, are not locally owned. In those cases divestiture may spark improvement. Furthermore, no evidence was presented that the local owners of the other stations are actively involved in daily management. Since "[m]ost of the parties state that their broadcast stations and newspapers have separate management, facilities, and staff . . . ." *Order* at 1059, it may be that owner management is unusual. Finally, there is no reason to suppose that local entrepreneurs will not find television an attractive investment.[96]

The second fear is that divestiture might disturb "continuity of operation . . . as the new owner would lack the long knowledge of the community and would have to begin raw." *Order* at 1078. As support, the Commission brief cites judicial

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96. *See* text accompanying note 102 *infra*. An argument evidently rejected by the Commission is that because large stations are so expensive, divested stations would be purchased primarily by group owners who would thereby accumulate undue power. It is not clear that this chain of events would transpire. And in any event, non-concentrated group ownership might constitute an effective bulwark against the power of the networks. *See* Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.Rev. 213, 238.

decisions giving recognition to the fact that "legitimate renewal expectancies are implied in the structure of the Communications Act" Rep.Br. at 15. The goal of certainty is to give broadcasters an incentive to make the investment required to produce quality programming. Whatever the legitimate strength of this policy in light of the statutory limitation on the interest in a license,[97] it has scant force in this case. A one-time alteration in the ownership structure of the broadcast industry should not effect the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity.[98] Furthermore, to the extent the Commission means that transfer

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97. "No such license shall be construed to create any use beyond the terms, conditions and period of the license." 47 U.S.C. § 301. *See Fidelity Television, Inc. v. FCC*, 169 U.S.App. D.C. 225, 515 F.2d 684, 705 (Bazelon, C. J., statement as to why he voted to grant rehearing en banc), (1975).

98. Of course, the public interest would be affected if the old licensees were "better" than their replacements. But the Commission cites no reason to believe that the new licensees will, in the long run, be inferior.

of ownership is by itself disruptive, its position is at odds with its practice of routinely approving license assignments.[99] Finally, even if transfer to non-local owners entails extraordinary disruption, there is no basis for assuming that such transfers will result from divestiture.[100]

[34, 35] The final fear is that "[l]ocal economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase in-

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99. There is some dispute regarding the number of transfers routinely approved by the Commission. Justice asserts that in the six years prior to the *Order*, the Commission approved without hearing 678 license assignments. Br. at 42. The Commission replies that almost 60% of these were pro forma assignments, such as "transfers to relations because of death, minority stock." Rep. Br. 18. Even assuming that such transfers are inconsequential, the number of other transfers suggests that "disruption" is not ordinarily a major concern for the Commission.

100. Commissioner Robinson pointed out that holdovers in high-level management often smooth the transition period. "Indeed, any other action by the new licensee would only reduce the value of his franchise." *Order* at 1128.

terest rates and affect selling price too." *Order* at 1083. Although it is not entirely clear, the Commission presumably was not concerned with financial hardship to the individual owners.[101] Private losses are a relevant concern under the Communications Act only when shown to have an adverse effect on the provision of broadcasting service to the public. *Federal Communications Commission v. Sanders Radio Station*, 309
[965] U.S. 470, 474–76, 60 S.Ct. 603, 84 L.Ed. 869 (1940); *Carroll Broadcasting v. F.C.C.*, 103 U.S.App.D.C. 346, 258 F.2d 440 (1958). Yet, as Commissioner Robinson theorized in his dissent, *Order* at 1127, divestiture should not even produce substantial *private* losses. Most cross-owned stations are held by their original owners who by now have long recouped their original investment. *Order* at 1130.[102]

In its brief, the Commission claims that its concern was the effect divestiture would have on future programming. It reasoned that because broadcasting stations are expensive, new owners would have insufficient working capital to finance news and other public affairs programming. Rep.Br. at 20. But presumably this would also be the case in voluntary transactions, which the Commission readily permits. A different public interest injury that might result from separation is the failing of marginal newspapers no longer supported by affiliated broadcast stations.[103] However, the

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101. There are, however, passages that suggest that this was the Commission's concern. "[D]ivestiture introduces the possibility of . . . hardship for individual owners." *Order* at 1078. In addition, the *Order* suggests that because some combinations were formed when broadcasting was not profitable, it would be unfair to deny continued operation to those owners now that it is. To the extent such a policy underlies the Commission's decision, it is impermissible. Licensing is to be in the public, not private interest.

102. Commissioner Robinson noted that some more recently formed combinations might not have yet returned their original investment. With respect to these, he concluded, "I am unwilling to assume that the public interest compels us to ratify the licensee's expectation that its three-year license constitutes a perpetuity which should not be revoked when other, and weighty, public interest considerations may require it." *Order* at 1130.

103. It is often assumed that the demise of the *Boston Herald* was caused by the revocation of the license of its wholly owned subsidiary, WHDH TV. Order at 1107 (Lee, R., Comm., concurring).

Commission did not rely on this point and, as Commissioner Robinson pointed out, the record contains no reliable information on the degree to which stations subsidize newspapers. *Order* at 1129.[104]

In sum, the Commission could not have rationally concluded that the competing policies it offered justified grandfathering absent a show of harm. And, since the record does not disclose the extent to which divestiture would actually threaten these values, the Commission could not have rationally concluded, if it did, that their potential impairment overcame the presumption against cross-ownership.[105] The gains in diversity

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104. Furthermore, if it appeared likely that a newspaper would fail as a result of divestiture, the Commission could reasonably conclude that the public interest called for waiver. *See International Shoe Co. v. FTC*, 280 U.S. 291, 302–303, 50 S.Ct. 89, 74 L.Ed. 431 (1930).

105. *Cf. Terre Haute Broadcasting Co.*, 25 FCC2d 348, 353–55 (1970); *Policy Statement on Comparative Broadcast Hearing*, 1 FCC2d 393, 394 (1965). *See WHDH, Inc.*, 16 FCC2d 1, 12–13 on recon., 17 FCC2d 856 (1969), *aff'd Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 444 F.2d 841, 859–60 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29

[footnote continued]

from divestiture may be speculative, but since divestiture is the most promising method for increasing diversity that does not entail governmental supervision of speech,[106] the Commission could not rationally conclude that lesser policies, lacking support in the record, require maintenance of the status quo.[107] "In passing upon con-

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L.Ed.2d 701 (1971); *Lorain Community Broadcasting Co.*, 13 FCC2d 106, 114, recon. denied, 14 FCC2d 604, rehearing denied, 15 FCC2d 388 (1968), review denied, 18 FCC2d 686 (1969), *aff'd Allied Broadcasting, Inc. v. FCC*, 140 U.S. App.D.C. 264, 435 F.2d 68, 69 (1970); *Ultravision Broadcasting Corp.*, 11 F.C.C.2d 394, 410–11 (1968), *aff'd WEBR, Inc. v. FCC*, 136 U.S. App.D.C. 316, 420 F.2d 158 (1969). *See generally TV 9, Inc. v. FCC*, 161 U.S.App.D.C. 349, 495 F.2d 929, 938 (1973), *cert. denied*, 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974).

106. *See* text accompanying notes 30–32 *supra*.

107. Justice offers as a separate grounds for reversal the Commission's failure to accord greater weight to antitrust considerations, particularly competition for advertising revenues. Although antitrust policy is relevant to the "public interest, convenience, or necessity" standard, as the Commission recognized it is only one component of a broader mandate. *Order* at 1079. *United States v. Radio Corporation of America*, 358 U.S. 334, 79 S.Ct. 457, 3

[footnote continued]

sideration open to the Commission even on an application for renewal of a license this [966] court has taken a stand against heavy reliance upon maintenance of the status quo." *TV 9, Inc. v. F.C.C.*, 161 U.S.App.D.C. 349, 495 F.2d 929, 937 (1973).[108]

L.Ed.2d 354 (1959); *Northern Natural Gas Co. v. FPC*, 130 U.S.App.D.C. 220, 399 F.2d 953 (1968). In deference to the strong authority in support of this proposition, Justice now claims the Commission should have given the antitrust laws "prima facie effect." However, the Commission was well within its discretion in rejecting Justice's suggestion, regardless of its label.

108. The *Order* not only leaves the status quo largely intact, it solidifies the position of existing combinations by making petitions to deny more difficult. Without reasoned discussion, the Commission has abandoned its former policy of allowing petitioners to deny the opportunity to demonstrate in any one of several ways that cross-ownership harms the public interest. *See* note 21, *supra*. The Commission's decision to substitute an antitrust standard for this open-ended test is inconsistent with the *Order's* emphasis on First Amendment considerations. Furthermore, it unreasonably curtails the interests of petitioners to deny. The Commission's decision to grandfather as the rule rather than the exception was based largely on its conclusion that the rulemaking record did not contain

[footnote continued]

In any event, even if the Commission's chosen presumption were supportable, its current policy could not stand. First, the record does not support the conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets. Nor does it show that the need for divestiture in the affected markets is "overwhelming" and the evidence "unambiguous." Although the affected markets contain fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater. The

evidence documenting the harmful nature of cross-ownership as a general matter. Had this policy been supportable, it would have been logical for the Commission to encourage showings of harm in individual markets, rather than effectively to prohibit it. In fact, the Commission itself seems to recognize the deficiencies of this standard. The Commission recently set for hearing the renewal of WGAL–TV, exclusively on the issue of cross-ownership "abuses" that do not constitute violations of the antitrust laws. Renewal of WGAL–TV, 39 RR2d 457 (1976). In passing, the Commission noted that it has neither the "expertise" or "experience" to enforce the antitrust laws and that it would be "inappropriate" for it to duplicate the functions of those agencies that are expert, *id.* at 463.

Commission "must do more than enumerate factual differences, . . . it must explain the relevance of those differences to the purposes of the Federal Communication Act." *Melody Music v. F.C.C.*, 120 U.S.App. D.C. 241, 345 F.2d 730, 733 (1965).

Finally, limiting divestiture to small markets of "absolute monopoly" squanders the opportunity where divestiture might do the most good. There is no apparent technological reason why additional broadcasters could not be licensed in many of the smaller markets.[109] In many large markets, on the other hand, newspapers possess highly coveted VHF licenses.[110] Divestiture thus may be more useful in the larger markets. The Commission's arbitrary cut-off at one independent in-coming signal prevents realization of such gains.[111]

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109. Because of geographic proximity, the Commission cannot always assign the maximum number of frequencies to each city.

110. "Currently, nearly every available VHF frequency is assigned and in use, ..." Federal Regulation and Regulatory Reform, Report of the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Dec. 6, 1976.

111. This is not to say that the Commission's focus on local news was improper. That focus seems entirely appropriate in light of the number of media voices concerned with national affairs.

Conclusion

Although we do not disturb the Commission's prospective rules, we conclude that the divestiture order is inconsistent with its longstanding policy that "nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible." The Commission has sought to limit divestiture to cases where the evidence discloses that cross-ownership clearly harms the public interest. For the reasons expressed above, we believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.[112] Accordingly, we vacate such portions of the *Order* that have retroactive effect and remand the
[967] record to the Commission for adoption of a rule not inconsistent with this opinion.

It is so ordered.

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112. Such cases could be accommodated through a waiver procedure. The *Order* contains an excellent discussion of the circumstances in which such waivers might be appropriate. *See Order* at 1085.

[Judgment: Filed March 1, 1977]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
TERM, 1976

No. 75-1064

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA.

No. 75-1152

OWOSSO BROADCASTING COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION.

No. 75-1289

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA.

No. 75-1379

WJAG, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION.

No. 75-1386

THE OGDEN NEWSPAPERS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION.

No. 75-1387

DAILY TELEGRAPH PRINTING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION.

No. 75-1388

THE OGDEN NEWSPAPERS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION.

No. 75-1567

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA.

No. 75-1614

THE BROCKWAY COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION.

No. 75-1618

GRAY COMMUNICATIONS SYSTEMS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA.

PETITIONS FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

JUDGMENT

These causes came on to be heard on petitions for review of an order of the Federal Communications Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the rule-making order under review herein is affirmed only insofar as it operates prospectively; those portions of said order that have a retroactive effect and those portions dealing with existing combinations are vacated; and the record is remanded to the Commission for adoption of rules not inconsistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/George A. Fisher
George A. Fisher
Clerk

Date: March 1, 1977
Opinion for the Court filed by Chief Bazelon.

[555 F.2d 967]

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Elyria-Lorain Broadcasting Co. et al., Intervenors.

OWOSSO BROADCASTING COMPANY, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

KSL, Inc., Intervenor.

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

KSL, Inc., Intervenor.

WJAG, Inc., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of

America, Respondents,

WHAS, Inc., et al., Intervenors.

The OGDEN NEWSPAPERS, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

KSL, Inc., Intervenor.

DAILY TELEGRAPH PRINTING COMPANY, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

WHAS, Inc., et al., Intervenors.

The OGDEN NEWSPAPERS, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

KSL, Inc., Intervenor.

AMERICAN NEWSPAPER PUBLISH-

ERS ASSOCIATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

KSL, Inc., Intervenor.

The BROCKWAY COMPANY, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

KSL, Inc., Intervenor.

GRAY COMMUNICATIONS SYSTEMS, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

KSL, Inc., Intervenor.

Nos. 75-1064, 75-1152, 75-1289, 75-1379, 75-1386 to 75-1388, 75-1567, 75-1614 and 75-1618.

United States Court of Appeals, District of Columbia Circuit.

April 5, 1977.

* * *

[968] On Motion for Stay of Mandate.

Before BAZELON, Chief Judge, and WRIGHT and ROBINSON, Circuit Judges.

PER CURIAM:

Before us is a motion filed by the Federal Communications Commission to stay the mandate to be issued by this court pursuant to its opinion and order on the merits of this case. The Commission suggests that immediate compliance with portions of our mandate would impose a "substantial burden" on its resources. Since the Commission is moving quickly to petition the Supreme Court for a writ of certiorari in this case, it asserts that such a burden ought not be required until the Supreme Court can act on its petition. The National Association of Broadcasters (NAB) supports the Commission's motion, arguing that immediate issuance of our mandate will require NAB's members to begin costly efforts leading to divestiture. The Department of Justice does not oppose the motion, but does not actively support it either. The National Citizens Committee for Broadcasting (NCCB) opposes the motion insofar as it

would reinstate the requirement that petitioners to deny individual license renewal applications allege a Sherman Act section 2 violation as a precondition for a hearing on the question of undue economic concentration. NCCB would also have us stay that part of our order which vacates Commission orders requiring divestiture in 16 so-called "egregious" cases. It is not clear, however, that NCCB or anyone else will seek further review of this segment of our opinion.

Before ruling on these motions, it is important to review the salient points of our March 1 opinion. By its order in the cross-ownership case, the Commission divided its regulatory province into three parts. New broadcast licenses would not be issued to any applicant which also owned a newspaper co-located with the proposed broadcast station's area of license. Present co-located newspaper-broadcast combinations, with 16 exceptions, were grandfathered and, in addition, the Commission took the view that further challenges to the renewal of these stations' licenses would have to meet tougher threshold requirements. Divestiture was ordered only where the sole broadcast station in a locality was owned by the sole daily newspaper in the same locality.

[969] The gist of our opinion is that the lines thus drawn between future and present co-located combinations and between the 16 egregious cases and all other present co-located combinations were arbitrary and capricious. We first indicated that the Commission had authority to promulgate its prospective rules even though the record was inconclusive on the question whether actual "abuses" flowed from newspaper-broadcast cross-ownership. We agreed with the Commission that long-established principles indicated that it could act to increase the diversity of broadcast media voices even when there was no evidence that a lack of diversity was producing harmful side effects. We recognized that the Commission had consistently acted on this principle and had received the approval of the courts (including the Supreme Court on a number of occasions) for this policy approach. Indeed, in its instant motion, the Commission has not asked us to stay our mandate insofar as it approves the prospective cross-ownership rules. Thus now as in its defense on the merits, the Commission apparently asserts its authority and intention to act to increase diversity even though

it has created no record of actual abuses stemming from cross-ownership.

Having asserted its authority and intention to act in this way with respect to applications for new licenses, however, the Commission insisted that it was required to find actual evidence of abuses before it could order divestiture of presently co-located facilities. The Commission itself recognized that such a shift of position had to be justified by reference to factors differentiating present from future licensees. One factor suggested was harm to the public interest in terms of a reduction in the quality of broadcast programming, but the Commission correctly found no record support for any such proposition. The Commission did assert policies competing with enhancement of diversity as support for its shift of emphasis, but on analysis we found that in the past these policies had consistently been given lesser weight than increased diversity and further that these policies if consistently applied in the future would require massive shifts in the practice of the Commission with respect to license transfers. We further found that the distinct treatment of the 16 egregious cases was invalid under the Commission's an-

nounced divestiture rule since the record contained no evidence that justified their disparate treatment.

Thus, "[h]aving evaluated the policies and record presented to us, we [held] that the Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture." — U.S.App.D.C. —, 555 F.2d at 962. In summarizing this holding, we said, "The Commission has sought to limit divestiture to cases where the evidence clearly discloses that cross-ownership harms the public interest." *Id.*, — U S.App.D.C. ——, 555 F.2d 966, at 60. And, we continued:

> For the reasons expressed above, we believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.

This final sentence is part of the summary of our holding that the retroactive rules are invalid, and its purpose was to indicate that the presumption upon which the Commission acted rendered the divestiture rule in-

valid. Nothing in our opinion supports a contrary conclusion.

Thus we were faced with a situation in which the Commission had treated three indistinguishable groups very differently. Because of this, steps had to be taken to restore consistent administrative treatment. Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules, and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight,
[970] we ordered the Commission to take further steps to ensure that everyone would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt, but which it had already indicated would be available with respect to the egregious 16).

Against this background, it should be plain that staying our mandate in this case would, *pro tanto,* sanction inconsistent treatment of licensees. On the other hand, the Commission warrants that it wishes to

file for review of our decision as quickly as possible, but that absent a stay it will incur substantial burdens, which could conceivably impede that effort. On consideration of these competing factors, we are persuaded to stay our mandate, only insofar as it applies to the Commission's grandfathering rules, until April 22, 1977, on the understanding that the Commission will have filed for certiorari by that date.

So ordered.

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, 76-1685

FEDERAL COMMUNICATIONS COMMISSION;
CHANNEL TWO TELEVISION COMPANY, *et al.*;
NATIONAL ASSOCIATION OF BROADCASTERS;
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION;
ILLINOIS BROADCASTING COMPANY, INC.; and
POST COMPANY, *et al.*,

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Volume II – Pages 445-742
EXHIBITS

Washington, D.C. • THIEL PRESS • (202) 638-4521

PETITIONS FOR WRITS OF CERTIORARI FILED
April 22, 1977; May 2, 1977; May 13, 1977;
May 16, 1977; May 20, 1977; and May 27, 1977;
CERTIORARI GRANTED OCTOBER 3, 1977

TABLE OF CONTENTS

VOLUME II – EXHIBITS

Page

LEGAL OPINION OF FCC GENERAL COUNSEL HAMPSON GARY SUBMITTED TO THE SENATE INTERSTATE COMMERCE COMMITTEE, January 25, 1937 445

M.H. SEIDEN & ASSOCIATES, INC., "MASS COMMUNICATIONS IN THE UNITED STATES – 1970," SUMMARY VOLUME (1971) (RESEARCH CONDUCTED ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS) 466

ANDERSON, "BROADCAST STATIONS AND NEWSPAPERS: THE PROBLEM OF INFORMATION CONTROL: A CONTENT ANALYSIS OF LOCAL NEWS PRESENTATIONS" (1971) (NAB EXHIBIT E), pp. 1-46 593

COMMENTS OF NAB (1971), pp. 11-24; 59-63 643

STERLING, "OWNERSHIP CHARACTERISTICS OF BROADCASTING STATIONS AND NEWSPAPERS IN THE TOP 100 MARKETS: 1922-1967" (March 5, 1971) (NAB Exhibit C), pp. 1-31 659

ROBBINS, "A STUDY OF PIONEER AM RADIO STATIONS AND PIONEER TELEVISION STATIONS" (April 1971) (NAB Exhibit D), pp. 1-21 694

COMMENTS OF ANPA (April 2, 1971), pp. 54-58 713

COMMENTS OF THE HOUSTON POST COMPANY, CHANNEL TWO TELEVISION COMPANY, AND KPRC RADIO COMPANY (May 17, 1971), pp. 16-25 719

COMMENTS OF A.H. BELO CORPORATION (May 17, 1971), pp. 8-9 730

Page

COMMENTS OF THE WASHINGTON POST COMPANY AND POST-NEWSWEEK STATIONS, CAPITOL AREA, INC. (May 17, 1971), pp. 2-4 732

COMMENTS OF THE PULITZER PUBLISHING COMPANY (May 17, 1971) 734

[Legal Opinion of FCC General Counsel Hampson Gary Submitted to Senate Interstate Commerce Committee]

January 25, 1937

MEMORANDUM TO THE COMMISSION:

OPINION OF THE GENERAL COUNSEL

In response to request of the Chairman of the Commission.

I.

HAS THE COMMISSION AUTHORITY, AT THE PRESENT TIME, TO DENY AN APPLICATION OF A NEWSPAPER FOR RADIO FACILITIES, ON THE GROUND THAT IT IS AGAINST PUBLIC POLICY.

The question presented is whether the Commission may deny an application of a newspaper for a license on the ground that it is against "public policy." The specific standard, or guide, provided by Congress in the Communications Act of 1934 is whether or not the granting of an application for license is "in the public interest, convenience or necessity." It must be determined at the outset, therefore, whether there is a difference between the term "public policy" and the standard of "public interest, convenience and necessity." We think the two may be distinguished. "Public policy" has been defined as:

> "that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good."

(Spalding v. Maillet, 188 P. 377; *Georgia Fruit Exchange v. Turnipseed,* 62 So. 542.)

In the sense of the definition given, it might be said that "public policy" is synonymous with "public interest." However, as was said in *Weeks v. New York Life Insurance Company,* 122 S.E. 586,

> "Public policy imports something that is uncertain, fluctuating, varying with the changing economic needs, social customs and moral aspirations of the people. A state has no public policy cognizable by the courts which is not derivable by clear implication from established law as found in its Constitution, statutes, and judicial decisions."

Again, in *Georgia Fruit Exchange v. Turnipseed, supra,* p. 544, the court said:

> "Public policy is broader than the mere terms of the statute or statutes and embraces their general purpose and spirit."

See also *Smith v. San Francisco & N. P. R. Co.,* 47 Pacific 582, 589, where the phrase is defined as follows:

> "Public policy is a term of vague and uncertain meaning, which it pertains to the law-making body to define, and courts are apt to encroach on the domain of that branch of government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. * * *"

As was pointed out in *Rast v. Van Deman & Lewis,* 240 U.S. 342, 357:

> "It is the *duty* and *function* of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare." (italics supplied)

This case is cited many times in other decisions, and we believe it is authority for the conclusion that a determination of "public policy" is the function of the legislature. Although it may be stated that the Federal Communications Commission is an arm of the Congress, or the agent of that legislative body, yet it is equally true that the Commission possesses only those powers specifically delegated to it by statute. *(Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 285).

From the above it would appear that "public policy" is a broader and in some aspects, a different term than "public interest." and that the determination of "public policy" is a function of Congress.

Since the Congress has delegated to the Commission the power to determine whether a grant of an application in any case will serve the "public interest" this is the only standard the Commission can apply, and our inquiry is limited to whether such standard furnishes authority to deny applications from newspapers. We do not mean to infer from the above that the Commission, in applying the standard of "public interest, convenience or necessity" to a given set of facts may not consider as a factor that the applicant before it owns or controls a newspaper.

The Supreme Court, in *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Company, supra,* has defined the standard and indicated some of the limitations upon the power of the Commission:

> "In granting licenses the Commission is required to act as public convenience, interest or necessity requires. This criterion is not to be interpreted as setting up a standard so indefinite as to confer as unlimited power. Compare *N.Y. Central Securities*

Co. v. United States. 287 U.S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities."

See also the following language in *N.Y. Central Securities Co. v. United States,* 287 U.S. 24:

"Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary."

It should be observed that the application of this standard by the Commission is subject to judicial review under Section 402(b) of the Act. Upon appeal from decisions of the Commission the court will examine the decision for the purpose of determining whether the Commission has stayed within the power thus delegated and therefore its decision was not arbitrary or capricious.

"A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority." *Nelson Bros. case, supra,* p. 277.

In my opinion, therefore, the Commission does not have the authority, under the existing law and in the absence of an expression of public policy on the subject by the Congress, to deny an application to a newspaper owner for radio facilities solely upon the ground that the granting of such an application would be against public policy. It is clear, however, that the Commission has the duty of examining the facts in each particular case to determine whether the granting of an application will serve "public interest, convenience or necessity." One fact among others to be considered by the Commission, is the business connections of the applicant, newspaper or other, and in my opinion the Commission has the power to refuse a license to a newspaper owner if upon all the facts before it in a given case the Commission is unable to find that the granting of such an application would serve public interest, convenience, or necessity.

II.

WHETHER LEGISLATION COULD BE PASSED DENYING THE RIGHT OF NEWSPAPERS TO OBTAIN BROADCASTING LICENSES IN THE FUTURE AND REQUIRING THEM TO DIVEST THEMSELVES OF EXISTING RIGHTS IN BROADCAST STATIONS WITHIN A REASONABLE TIME.

It is well settled that all radio broadcasting is within the regulatory power of Congress under the Commerce Clause of the Constitution *(American Bond & Mortgage Company v. United States,* 52 F. (2d) 318; *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 267). This power is "supreme and plenary" (Minnesota Rate Cases, 231 U.S. 352, 398); is "complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations, *other than those prescribed*

in the Constitution." (*Gibbons v. Ogden,* 9 Wheat. 1, 196). And the power to regulate includes the power to prohibit (*The Lottery Cases,* 188 U.S. 321).

It should be determined at the outset whether there exist any constitutional limitations upon the power of Congress to regulate interstate and foreign commerce. It would appear that if such limitations exist they may be found in the First or Fifth Amendments to the Constitution.

The portions of the First Amendment which need be examined in connection with the legislation proposed are as follows: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." It is submitted that legislation such as that proposed would constitute no abridgment of freedom of speech or of the press since ownership or control of a radio broadcast station is not essential to the right to speak or the dissemination of news, and the owning or controlling of a broadcast station as a business has nothing to do with the freedom of speech or of the press as such, because the newspaper would still have the same right to communicate by printing or broadcasting, which is enjoyed by any other person or class.

This is demonstrated by the following language from the case of *Trinity Methodist Church, South v. Federal Radio Commission,* 62 Fed. (2d) 850, 853, in which the court affirmed a decision of the Commission refusing to renew the applicant's broadcast license:

> "This is neither censorship nor previous restraint, *nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise.* Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. * * * but he may not, as we think, *demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe."* (Italics supplied)

Moreover, the freedom of the press is not abridged by a reasonable regulation of commerce promulgated by the Congress under constitutional authority for the protection of all the people, including the press.

In *Toledo Newspaper Co. v. U.S.,* U.S. 402, 419, Chief Justice White, speaking for the court, dismissed the argument that a law providing for the punishment of contempts of court which obstructed justice was an interference with freedom the press, in the following language:

> "We might well pass the proposition by because to state it is to answer it, since it involves in its very statement the contention that *the freedom of the press* is the freedom to do wrong with impunity and *implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends."* (Italics supplied)

Chief Justice Fuller, in the case entitled *In re: Rapier,* 143 U.S. 110, 134, said:

> "We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; *nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people.* The free-

dom of *communication* is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters *condemned by its judgment, through the governmental agencies which it controls." (Italics supplied)*

Inasmuch as the granting of a license to operate a broadcast station does not give the licensee any vested property right *(American Bond & Mortgage Company v. United States,* 52 Fed. (2d) 318), (Sections 304 and 309(b) of the Communications Act of 1934) and since broadcast licenses must be renewed every six months, each appliation for renewal thereof being considered *de novo,* the right to hold or acquire property does not appear to be involved. For the same reasons the constitutional question presented in considering the power of Congress to deny newspapers the right to acquire broadcast stations in the future is not different from that presented as to its power to require them to divest themselves of the control of such stations within a reasonable time.

That protection of a person or class of persons to equality under the law exists under the Fifth Amendment is clearly indicated in the lineof decisions noted herein; In In the case of *U.S.* v. *Yount,* 267 F. 861, the court said, in discussing the power of Congress to "classify" as incidental to its power to regulate commerce:

"The 'due process of law' by which Congress is limited in the Fifth Amendement and the states by the Fourteenth Amendment is equivalent to the 'law of the land' and is intended to protect the citizen against arbitrary action, and secure *to all persons equal and impartial justice under the law.* (Italics supplied). Davidson v. New Orleans, 96 U.S. 97, 24

L. ed. 616; Missouri Pacific Ry. v. Humes, 115 U.S. 512, 6 Sup. Ct. 110, 29 L. ed. 463.

"It seems reasonably clear that the 'due process of law' provision of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the Laws' which no state may deny to any person under the provisions of the Fourteenth Amendment. Leeper v. Texas, 139 U.S. 462, 11 Sup. Ct. 577, 35 L. ed. 225; Giozza v. Tiernan, 148 U.S. 657, 12 Sup. Ct. 721, 37 L. ed. 599."

In *Nebbia* v. *U.S.,* 291 U.S. 502, the court observed (Page 536):

"It is clear that there is no closed class or category businesses of affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. Chas. Wolff Packing Co. *v.* Court of Industrial Relations, 262 U.S. 522, 535, 67 L. ed. 1103, 1108, 43 S. Ct. 630, 27 A.L.R. 1280."

In stating that "Classification is allowable under the provisions of the Constitution" the court in the case of *U.S. v. Yount, supra,* cited the case of *Gulf Colorado & Santa Fe Railway v. Ellis,* 165 U.S. 150. In this latter case the court said, at page 165, that the classification "must always rest upon some difference which bears a reasonable and just relationship to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis."

The above cases indicate that classification is a necessary adjunct to the power to regulate. Since the proposed legislation would be a regulation of interstate commerce,

and since it would discriminate against a class, the precise question involved is (*whether the power of Congress to make such a regulation is limited by the due process clause.*

It would appear well settled that Congress, in the exercise of its power to regulate interstate commerce, may interfere indirectly with private rights which otherwise might be protected by the due process clause. In *Knox v. Lee* (Legal Tender Cases), 79 U.S. 457, it is said:

> 'That provision (due process clause) has always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm or loss to individuals."

See aslo *United States v. Joint Traffic Ass'n.*, 171 U.S. 505; *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211; *United Bridge Co. v. United States*, 204 U.S. 365: *Willoughby on Constitutional Law*, 2nd Ed. Sections 1225, 1227, Vol. 3, pp. 1857, 1861.

The criterion which must be applied is whether the legislative action has a reasonable relation to a purpose which is within Congressional authority. This principle is enunciated in the case of *Lewis Publishing Company v. Morgan*, 229 U.S. 288, wherein the legality of certain conditions imposed by Congress on the eligibility to use the second class mails was attacked on the ground that it violated both the First and Fifth Amendments. The court held that Congress by establishing "second class" postal matter was giving effect to a policy of favoring a wide spread circulation of newspapers, periodicals, etc., "in the interest of dissemination of current intelligence." The criterion applied by the Court in considering the validity of the legislation is

indicated by the following exerpt, page 314, of the opinion:

> "The question therefore is only this, Are the conditions which were exacted incidental to the power exerted of conferring on the publishers of newspapers, periodicals, etc., the privileges of the second class classification or are they so beyond the scope of the exercise of that power as to cause the conditions to be repugnant to the Constitution? We say this is the question since necessarily if the power exists to legislate by discriminating in favor of publishers, the right to exercise that power, carries with it the authority to do those things which are incidental to the power itself or which are plainly necessary to make effective the principal authority when exerted. In other words, from this point of view, the illuminating rule announced in McCulloch *v.* Maryland and Gibbons v. Ogden, governs here as it does in every other case where an exertion of power under the Constitution comes under consideration. The ultimate and narrow question therefore is, are the requirements of the provision in question incidental to the purpose intended to be secured by the second class classification?"

The court sustained the conditions as being "incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded."

Thus, it may be seen that if the proposed legislation denying newspaper owners the right to own or control a broadcast station has a reasonable relationship to a purpose which Congress has the power under the commerce clause to accomplish, then the incidental or indirect interference with personal liberty is not repugnant to the First or Fifth Amendments.

Further, this test which the Courts may apply as to *whether there is a reasonable relationship between the purpose and the means used to accomplish it,* must be clearly distinguished from the question as to the *wisdom of the end sought to be accomplished, or the policy adopted by Congress, power over which is vested solely within the legislative branch of the Government.*

In the Lottery case, supra, this principle was stated as follows:

> "In determining the character of the regulations to be adopted, Congress has a large discretion which is not to be controlled by the courts simply because in their opinion such regulations may not be the best or most effective that could be employed."

This principle is even more clearly stated in the case of *Northern Securities Co. v. United States,* 193 U.S. 197, which involved legislation of much the same class as that under consideration. The law in question was the provision of the Sherman Anti-Trust Act which prohibited "every combination" etc., in "restraint of trade." The fact that the purpose of the act was to prevent restraints of trade brought it within the power delegated to Congress under the Commerce clause, but the objection was made that it interfered with the "liberty" to contract which is guaranteed by the Fifth Amendment. The Court said:

> "The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as a rule for *interstate and international commerce.* (Not for domestic commerce.) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition.

> We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitutions? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men." (pp. 337-338)

It would appear from these cases that if Congress sees fit to declare a policy to be followed in the regulation of interstate commerce (broadcasting) and provides that in

order to carry out that policy, no newspaper shall operate a broadcasting station, the Courts will not question the wisdom of the policy, but will consider such legislation *only* for the purpose of determining whether the prohibition has a reasonable relation to, or is a reasonable means of accomplishing an end which is within the regulatory power of Congress.

Factors which would militate against holding arbitrary or unreasonable the regulation of interstate commerce as herein proposed are the actual facts and usages attendant upon joint ownership and operation of a broadcast station and a newspaper.

It is submitted that these factors should not be examine for the purpose of passing on the wisdom of the legislation but only for the purpose of determining whether an unreasonable or arbitrary classification has been made. *Chicago, B. & Q. R. R. Co. v. McGuire,* 219 U.S. 549. In that case the court said at page 569:

> " * * * The scope of judicial inquiry in deciding the queston of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

It is conceivable, that situations might arise where the mutual control of a newspaper and a broadcast station would have no effect upon the operation of the station in the public welfare. If this be true, would an act barring

every newspaper from owning or operating a broadcast station exceed the end to be accomplished? This question arose in connection with the Anti-Trust Act, supra, which prohibited *"every"* contract in restraint of trade. Prior to the Standard Oil case, 221 U.S. 1, the Supreme Court consistently held that when Congress said *"every"* it laid down a *policy* which the Court could not question, and the act, so interpreted, was held to be constitutional *(Addyston Pipe & Steel Co. v. United States.* 175 U.S. 211; *Northern Securities Co. v. United States, supra.).* In the Standard Oil case, 221 U.S. 1, the Court established the well-known "Rule of Reason" which was applied in that and later cases. The different interpretation of the Anti-Trust Act, however, appears to have been based upon what the Court considered to be the common law concept of the term "restraint of trade" as used in the Act. The Court said:

> " * * * It is certain that these terms ('Restraint of trade' and 'monopoly') at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.
>
> "We shall endeavor, then, first to seek their meaning, * * * by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-Trust Act."

While the interpretation placed upon the Act in the *Standard Oil case, supra,* might be said to weaken the former decisions as to the constitutionality of the Act as originally construed, it did not constitute a reversal of the former cases as to such constitutionality; but rendered a consideration of the question unnecessary.

Other analogous legislation is contained in Section 1, Paragraph 8 of the Inerstate Commerce Act commonly known as the "Commodities Clause" which provides that:

> "From and after May 1, 1908, it shall be unlawful for any railroad company to transport from any state, * * * any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

This clause was held constitutional by the Supreme Court of the United States in the cases of *U.S. v. Delaware & Hudson Co.*, 213 U.S. 366 and *Delaware L. & W. R. R. Co. v. U.S.*, 231 U.S. 363.

In the former case the Government sought to enjoin five railroads from shipping coal over their lines. Some of these corporations owned and worked mines and transported over their own rails in interstate commrce the coal so mined either for their own account *or for the account of those who had acquired title to the coal prior to the beginning of the transportation.* As to this last group, the Government contended that the Act prohibited the carrying of any coal with which the line was formerly connected regardless of present ownership. One of the main defenses the companies claimed, on the other hand, was that the Act was unconstitutional because it deprived them of property without Due Process. The court pointed out that the broad interpretation contended for by the government would raise serious constitutional questions; that where an act is susceptible of two interpretations one of which would be constitutional and the other not, the construction upholding the validity of the law should be applied; and, therefore, construed the Act as applying only where there was an actual and a present connection between the company and the commodity. It was then concluded:

> "We think it unnecessary to consider at length the contentions based upon the due process clause of the Fifth Amendment, * * * When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that in substance and effect the argument really asserts that the clause as construed by the Government is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappear as a result of the construction which we have given the statute. Through abundance of caution we repeat that our ruling here made is confined to the question before us. Because, therefore, in pointing out and applying to the statute the true rule of construction, we have indicated the grave constitutional questions which would be presented if we departed from that rule, we must not be considered as having decided those questions. We have not entered into their consideration, as it was unnecessary for us to do so."

The *Delaware L. & W. case, supra*, involved a question as to whether a shipment of hay to be used in feeding mules in mines owned by the defendant railroad was a violation of the Commodities Act. The railroad challenged the constitutionality of the Act and contended inter alia that, "It is a matter of complete indifference

to the public * * * whether or not the railroad company does or does not engage in such transportation, so long as it continues lawfully to own and operate its mines, and the Commodities Clause in prohibiting such transportation has no reasonable relationship to the accomplishment and any legitimate public object, but is arbitrary, unreasonable and unnecessary and violates the Fifth Amendment." The court in holding that the Act did have a reasonable relationship to the regulation of interstate commerce said:

> "But the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented."

In making an analogy between these two cases and the question under consideration, the *Delaware and Hudson* case might be advanced as authority for the contention that a statute denying the right of *all* newspapers to operate radio stations would be unconstitutional as applied to an extreme situation; for instance, in a case where the owner of a Farmers' Weekly in Minnesota applied for a license to operate a station in Washington, D.C.

However, the above quoted language from the *Delaware L. & W.* case is authority for the conclusion that if there is a reasonable relationship between the prohibition of mutual control of radio facilities and newspapers the courts would not be concerned with the question as to whether in a particular case such mutual ownership was actually detrimental to the operation of the station.

While the above mentioned authorities relative to legislation similar to that contemplated serve to establish the criterion which would be applied in testing the validity of the proposed statute, it is submitted that they afford no basis for a positive conclusion as to its constitutionality.

Section 11 of the Panama Canal Act of August 24, 1912, 37 Stat. 560, made it unlawful for any railroad or other carrier to own, operate, etc. "any common carrier by water operating through the Panama Canal or elsewhere with which such railroad or other carrier does or might compete for traffic or any vessel carrying freight or passengers on such water route or elsewhere with which such railroad or other carrier competes or might compete." This Act further provided that the Interstate Commerce Commission should determine the extent or possibility of competition. A date was specified on which all common ownership should cease, but it was also provided that the Commission should determine whether any "such existing specified service" was being operated in the public interest, etc., and empowered it to grant extensions to those which were challenged to such consideration upon the merits of the individual case. The constitutionality of this legislation has not been successfully challenged to date. See *Lehigh Valley Railroad Co. v. U.S.* (Dist. Ct. E. Dist. Pa. May 12, 1916, 234 F. 682).

Legislation similar to the type contemplated herein is found in Sections 310(a) and 311 of the Communications Act of 1934 wherein the Commission is directed to refuse to grant a license to an enumerated class of persons, among them being aliens, representatives of foreign governments, foreign corporations, etc., and also any person found guilty of unlawful monopoly, as defined therein.

The proposed legislation would impose a prohibition against a class, i.e., newspaper owners, and, in that

respect, would be analogous to Section 310(a) of the present act which contains a similar prohibition against aliens.

Senator Wheeler inquires:

> "Whether, if the Commission has not such authority at the present time, legislation could be passed denying the right for all newspapers to acquire radio stations in the future and requiring all newspapers within a reasonable time to divest themselves of the ownership and control of such stations."

A careful review of the decisions of the Supreme Court with respect to existing legislation whch appears to be analogous or similar to that here suggested and those decisions with respect to the regulation of interstate commerce by the Congress and matters bearing a reasonable relation thereto, impel me to a conclusion that the constitutionality of an act of Congress denying the right to all newspaper owners as such to obtain broadcast licenses in the future and requiring all newspapers to divest themselves of such ownership or control within a reasonable time, is not free from doubt, and, therefore, I think the inquiry does not permit of a categorical answer.

However, let me add, it is established that all radio broadcasting is interstate commerce; that, under the Constitution, the Congress has the power to regulate interstate and foreign commerce; that the criterion to be applied is whether the proposed legislation has a reasonable relation to a purpose which is within constitutional authority; and, that the power to regulate interstate and foreign commerce is limited only by the provisions of the Constitution itself.

I am of the opinion that the mutual ownership and control of newspapers and broadcast stations bears a reasonable relation to and has an effect upon interstate commerce and, therefore, if the Congress enacted a law of the purport suggested, it should meet the constitutional requirements.

[M. H. Seiden & Associates, Inc., "Mass Communications in the United States—1970," Summary Volume (1971) (research conducted on behalf of the National Association of Broadcasters)]

ALPHABETIC GUIDE

Market	Rank
Aberdeen	83
Abilene-Sweetwater	136
Ada	172
Albany, Ga.	148
Albany-Schenectady-Troy	38
Albuquerque	81
Alexandria, La.	164
Alexandria, Minn.	157
Altoona	75
Amarillo	92
Ardmore-Ada	172
Asheville	41
Atlanta	18
Augusta	90
Austin, Texas	129
Bakersfield	134
Baltimore	16
Bangor	149
Baton Rouge	96
Bay City	52
Beaumont-Port Arthur	107
Bellingham	190
Billings	159
Biloxi	178
Binghamton	112
Birmingham	33

Market	Rank
Bismarck	128
Bluefield	153
Boise	146
Boston	6
Bristol-Johnson City	85
Buffalo	22
Burlington-Plattsburgh	114
Butte	181
Cadillac	145
Cape Girardeau (Paducan-Harrisburg)	77
Carthage	155
Casper-Riverton	176
Cedar Rapids-Waterloo	72
Champaign-Decatur-Springfield	69
Charleston, S.C.	113
Charleston-Huntington, W.Va.	31
Charlotte	35
Chattanooga	79
Cheyenne	156
Chicago	3
Chico-Redding	142
Cincinnati	20
Clarksburg-Weston	166
Cleveland	8
Colorado Springs-Pueblo	110
Columbia, S.C.	100
Columbia-Jefferson City	126
Columbus, Ga.	99
Columbus, Miss.	162
Columbus, Ohio	36
Corpus Christi	121
Dallas-Ft. Worth	12
Davenport (Rock Island-Moline)	66

Market	Rank
Dayton	44
Daytona Beach	50
Decatur, Ala.	106
Decatur, Ill.	69
Denver	32
Des Moines	65
Detroit	7
Dothan	152
Duluth (Superior)	89
Durham	68
Eau Claire	135
El Dorado	109
El Paso	104
Elkhart	87
Ensign	201
Erie	139
Eugene	132
Eureka	174
Evansville	88
Fargo	95
Flint-Saginaw-Bay City	52
Florence, Ala.	106
Florence, S.C.	150
Fort Myers	185
Fort Smith	158
Fort Wayne	84
Fort Worth	12
Fresno-Visalia	67
Glendive	204
Grand Junction (Montrose)	182
Grand Rapids-Kalamazoo	37
Great Falls	163
Green Bay	73

Market	Rank
Greensboro-Winston Salem (High Point)	53
Greenville-Spartanburg--Asheville	41
Greenville-New Bern-Washington	74
Greenwood	175
Hampton	46
Harrisburg-York-Lancaster-Lebanon	48
Harrisonburg, Va.	187
Hartford-New Haven	21
Hastings	80
Hattiesburg	165
Hays	194
Helena	202
Houston	14
Huntington	31
Huntsville-Decatur-Florence	106
Idaho Falls-Pocatello	160
Indianapolis	15
Jackson, Miss.	71
Jackson, Tenn.	203
Jacksonville	60
Jefferson City	126
Johnson City	85
Johnstown-Altoona	75
Joplin (Pittsburg, Kan.)	119
Kalamazoo	37
Kansas City	25
Kearney	80
Klamath Falls	197
Knoxville	61
La Cross-Eau Claire	135
Lafayette, La.	120
Lake Charles	167
Lancaster	48

Market	Rank
Lansing	97
Laredo	196
Las Vegas	143
Laurel-Hattiesburg	165
Lawton	103
Lebanon	48
Lexington	124
Lima	184
Lincoln-Hastings-Kearney	80
Little Rock	56
Los Angeles	2
Louisville	40
Lower Rio Grande Valley (McAllen-Brownsville, Weslaco)	141
Lubbock	125
Lufkin	195
Lynchburg	63
Macon	133
Madison	108
Mankato	170
Marquette	168
Mason City	137
Medford	173
Memphis	24
Meridian	151
Miami	19
Midland	127
Milwaukee	23
Minneapolis-St. Paul	13
Minot-Bismarck	128
Missoula	193
Mobile-Pensacola	62
Monroe-El Dorado	109

Market	Rank
Monterey	93
Montgomery	115
Nashville	28
New Bern	74
New Haven	21
New Orleans	34
Newport News	46
New York City	1
Norfolk-Portsmouth-Newport News-Hampton	46
North Platte	199
Odessa-Midland	127
Oklahoma City	42
Omaha	64
Orlando-Daytona Beach	50
Ottumwa (Kirksville)	171
Panama City	191
Pembina	200
Pensacola	62
Peoria	86
Philadelphia	4
Phoenix	45
Pittsburgh	10
Plattsburgh	114
Pocatello	160
Poland Spring, Me.	78
Port Arthur	107
Portland, Ore.	26
Portland-Poland Spring, Me.	78
Portsmouth	46
Presque Isle	188
Providence	30
Pueblo	110
Quad City	66

Market	Rank
Quincy (Hannibal)	122
Raleigh-Durham	68
Rapid City	169
Redding	142
Reno	154
Richmond	57
Roanoke-Lynchburg	63
Rochester-Mason City (Austin)	137
Rochester, N.Y.	70
Rockford	98
Roswell	179
Sacramento-Stockton	29
Saginaw	52
St. Joseph	161
St. Louis	11
St. Paul	13
St. Petersburg	27
Salinas-Monterey	93
Salisbury	186
Salt Lake City	49
San Angelo	189
San Antonio	47
San Diego	39
Santa Barbara	147
Savannah	131
Schenectady	38
Scranton	58
Seattle-Tacoma	17
Shreveport-Texarkana	55
Sioux City	116
Sioux Falls-Aberdeen	83
South Bend-Elkhart	87
Spartanburg	41

Market	Rank
Spokane	76
Springfield, Ill.	69
Springfield, Mo.	94
Springfield, Mass.	82
Steubenville	101
Stockton	29
Sweetwater	136
Syracuse	43
Tacoma	17
Tallahassee	138
Tampa-St. Petersburg	27
Temple	102
Terre Haute	105
Toledo	59
Topeka	130
Traverse City-Cadillac	145
Troy	38
Tucson	111
Tulsa	51
Tupelo	198
Twin Falls	183
Tyler	177
Utica	118
Visalia	67
Waco-Temple	102
Washington, D.C.	9
Washington, N.C.	74
Waterloo	72
Watertown-Carthage	155
Wausau-Rhinelander	144
West Palm Beach	91
Wheeling-Steubenville	101
Wichita	54

Market	Rank
Wichita Falls-Lawton	103
Wilkes-Barre-Scranton	58
Wilmington	140
Winston-Salem	53
Yakima	123
York	48
Youngstown	117
Yuma	180
Zanesville	192

METHODOLOGY

Objective Of This Study

The objective of this study is to identify all of the commercial media used in mass communications in the United States and organize them by market and by ownership. The following are the types of media that are included:

Code	Medium
T	Commercial Television
A	Commercial Radio: AM
C	Commercial Radio: AM/FM
F	Commercial Radio: FM
R	Commercial Radio: established since 1966
N	Daily Newspapers
W	Weekly Newspapers
M	Nationally Distributed Magazines (Selected)

Its Organization

This study consists of four volumes. The first is a statistical summary of each of the 204 markets which

encompasses all of the counties and cities in the continental United States. Volumes two through four are the director volumes in whch are listed by name, the owners of the media originating in (marked with an asterisk) or reaching into (from outside) each market, and the properties that constitute their holdings. Most of the properties are accompanied by a rough measure of their "reach" or audience, expressed in terms of the absolute number of homes reached in that market and in the share of the market that this circulation represents. The markets themselves are ranked in declining order of size based on the number of homes in the market.

Selecting the Media

All forms of mass communications except educational television, educational radio, and CATV systems were included. CATV systems, for the most part, did not originate programs during the 1969-70 period covered by this study, and data were not available for educational media although they now constitute a major source of programming. To the extent that CATV systems bring distant signals into a market, their effect is included in the surveys of television viewing reported by American Research Bureau (ARB), whose data were employed in this study.

Magazines were restricted to 50 that met the following three criteria:

(1) They are avilable nationwide;
(2) They relate in some way to social or political issues;
(3) Data are available regarding their circulation by market.

The second criterion led to the exclusion of such national publications as *Popular Mechanics and Modern*

Bride. In the absence of circulation data by county or market (the third criterion), the number of relevant magazines and nationally distributed newspapers is understated in nearly every market.

The following important "issue" magazines and newspapers were not included due to the unavailability of reliable circulation data on a market basis:

Atlantic Monthly	Nation
Consumer Report	National Review
Consumers Union	New Republic
Dissent	Ramparts
Commerce Daily	Christian Science Monitor
Wall Street Journal	National Observer

Accompanying this introduction is a list of the magazines that were included as well as those magazines for which data were available but because of their subject matter were excluded. Despite the relatively small number of magazines included in this study, they entailed the processing of nearly 150,000 records (50 magazines circulating in over 3,000 counties).

Sources

The data regarding the number and circulation of media were drawn from a wide range of sources, all of them private, as listed below:

Media	Source
Television	ARB 1969 Coverage Study/TV Factbook, 1970
Radio	Pulse, Inc., 1967/Broadcasting Yearbook, 1970
Dailies	Sinding Yearbook, 1969/Editors & Publishers Yearbook 1970

Weeklies	National Director of Weekly Newspapers, 1970
Magazines	ABC Circulation, Inc. 1970

Where publications are concerned, the sources listed above generally supplemented the circulation data of the Audit Bureau of Circulation when the latter did not provide the figures. In the case of weeklies, the source also identified the publishers or owners. In all instances, it was possible to determine the market of origin of each publication. Magazines, however, are not identified as originating in a specific market. Their national orientation rendered this fact irrelevant.

In the case of radio stations, the 1967 survey by Pulse, Inc. offered the most recent and reliable circulation data available. Stations that went on-the-air since the survey were also included in this study, but without circulation figures (UNK).

Defining the Market

There are a number of definitions of a "market." Among the most common is the Standard Metropolitan Statistical Area (SMSA), defined by the U.S. Bureau of the Budget. This is a grouping of contiguous counties surrounding a city. They represent a market based on population criteria. There is a fairly long time lag in the adjustment of the SMSA definition of a market and it is not always an accurate reflection of the economics of the market place.

The city itself is sometimes employed to define the "market," but it is a political rather than an economic concept.

More recently, the American Research Bureau (ARB) developed the ADI concept (Area of Dominant Influence).

This is a communications oriented concept in which every one of the 3,100 counties in the nation is assigned to some market. The market to which a county is assigned is based on the location of the television stations that command the majority of the viewing hours reported for that county.

The broad geographic coverage of television signals is the most valid basis for identifying integrated geographic and economic units. It defines a market from the standpoint of the advertiser. This is generally true in the case of the newspaper as well as television. Thus, Sinding's Newspaper Directory includes a listing of newspapers by ADI. Within this geographic coverage area are numerous sub-markets even within the inner city, each with their own radio stations, dailies and weeklies.

Commuter mobility which has led to the development of suburban satellite communities around the urban core has also led to the decentralization of retail sales facilities through widely scattered shopping centers. Consequently, the communications media have become the binding force in today's retail markets The ADI concept was therefore employed in the present study as the definition of a market. With the exclusion of Hawaii and Alaska, there are 204 markets in this study, encompassing all the counties, homes, commercial media, and media owners within the continental United States.

An adjustment in the ARB definition of some of the markets was required in order for television data to conform to the circulation data available in the case of other types of media. As an example, the western half of Kern county constitutes the Bakersfield, California market as defined by ARB. In this study the television media and television audiences in the eastern half of Kern county were shifted away from Los Angeles and

added to Bakersfield. This type of adjustment was necessary in a number of markets. In addition to the number of media and media owners assigned to a market, this adjustment also effected the number of households credited to the market and consequently the market's national rank in terms of its size.

Ownership

Ownership and its relationship to control over media is an evasive concept. Each month the Federal Communications Commission, for its own use, prints a four volume computer listing of the name of every person owning over 1% of a radio or television station. This pile of paper stands 6 inches high, but tells us nothing that would be of assistance in analyzing the issues underlying the present concern of the Commission.

To avoid sinking into a similar morass of detail, the media in this study were generally grouped by corporate owner rather than by the name of the stockholders. Thus this study identified and collated media properties in each market that are connected by a common thread of ownership. This was done for those "outside" media that penetrate the market as well as for the media that originate locally. The result is a detailed census that presents a factual and useful picture of the commercial communications universe.

Sources

The trade publications maintain the most comprehensive and up-to-date record of cross-ownership of media. These sources include the Broadcasting Yearbook (TV and radio), Editors and Publishers Yearbook (dailies), and the American Newspapers Representative Annual (weeklies).

This information was cross-referenced and brought up-to-date as of June 30, 1970. A number of Washington attorneys representing the larger media organizations were also contacted to clarify the more complex ownership relationships.

Application

Each county was assigned its complement of media, media owners, and the audience or circulation of each medium in that county. This county information was assembled by the computer to form the ADI markets as defined by ARB (1968/69 definitions) subject to the adjustments described earlier. The average audience reached at a moment in time by each communications property, was then divided into the total number of homes in the market to arrive at the relative proportion of the market reached by each property. These properties were then grouped by owner under a four digit owner code assigned to each media property. In the directory volumes, an asterisk identifies those properties that originate within the market.

In the case of television circulation figures, the only source available by county is the ARB 1969 Coverage Study. These data consist of the total number of homes in the county and the percentage of hours of viewing they directed at each television station. These percentages were applied to the number of homes in the county in order to derive an absolute figure that could be cumulated for the market. The television circulation data that resulted more closely resemble a market share than the net weekly or net daily circulation.

These audience data provide a snapshot view of the number of homes reached by each medium at a moment in time. The purpose of this approach is to provide a

rough measure of their relative scale. In fact, however, each medium ultimately reaches many times the number of homes indicated in this study. It is safe to say that the network affiliated television stations originating in a market are received in nearly every household that has a television set in their market at least once in the course of a week. By the same token, media originating outside the market also reach more homes in the market in the course of the week than that indicated in this study. This is true of radio, newspapers and magazines, as well as television eminating from outside a market.

A circulation cut-off in which media obtaining less than 100 homes were dropped from a market was applied to all types of media. This resulted in a more conservative estimate of the number of media available in each market. Other decisions that resulted in a conservative estimate of available media was the use of weekday rather than Sunday circulation figures for newspapers. The higher Sunday circulation figures were sometimes sufficient to have increased the number of media in the +5% column in the summary or matrix volume, as discussed below. Perhaps most important, AM/FM combinations were counted as a single entry regardless of the degree to which their programming was independent.

In addition to the number of media and media owners originating in each market, the statistical summaries in Volume One present a tabulation of the number of media and owners that originate *outside* of the market but which are received in the market, and of these there is a column that shows the number that reach 5% or more of the homes in that market at any given moment.

The media and media owners entering a market from outside represent to the economist an approximation of the competition overhanging that market. Such media

can, if the expense is warranted, expand their circulation or audience in that market. This is of particular significance in the case of radio and television which are regulated and for which free entry, even of a limited nature, is generally not assumed.

Illustration of Results

In the heading of the illustration shown below, which is the format used throughout Volume I, is the market's rank, name, and size in terms of the number of homes located in that market. Thus Tyler, Texas ranks as market 177 based on its count of 45,000 homes. The first line in the Table itself is a summary count of the number of different media available to the public in this market, and the second line is the number of owners of these media. This is followed by a breakdown of the number of media available in the market.

The columns, proceeding from left to right, provide a breakdown of the totals, distinguishing between media that originate within this market and those that enter the market but originate elsewhere. The latter, those originating elsewhere, are further broken down to indicate the number of "outsiders" that obtain a local audience equal to 5% or more of the homes in the market.

Thus, the accompanying illustration shows that in Tyler, Texas, the public uses 84 different media that are owned by 68 different owner organizations (not counting the individual stockholders in each "organization"). Of this number, 22 of the media originate within this market, and they are owned by 19 owner organizations (*i.e.*, a few owners own more than one medium originating in this market).

Similarly, 62 different media are received by Tyler's citizens from outside their market, and these media are

owned by 49 different owner organizations. An owner, once counted as indigenous to the market, is not counted again if he also owns a medium entering from outside the market. Of the 49 owners "entering from outside" 13 each have access to 5% or more of the audience in the Tyler market. The number of different types of media involved are indicated under each of the relevant captions discussed above.

MARKET 177 TYLER, TEXAS HOMES: 45,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	84	22	62	19
OWNERS	68	19	49	13
TV STATIONS	9	1	8	3
RADIO STATIONS	23	9	14	1
DAILY NEWSPAPERS	8	2	6	1
WEEKLY NEWSPAPERS	10	10	0	0
MAGAZINES	34	—	34	14

Differences With FCC Data

The present illustration provides an opportunity to focus on differences between the FCC's figures and those resulting from the present study. Thus, the FCC reports that there are only 4 radio stations and only 1 television station assigned to the Tyler market. Our findings indicate that in fact, 23 radio stations and 9 television

stations are available off-the-air in the Tyler market. Of the latter, 1 television station and 9 radio stations originate in Tyler, and 14 radio and 8 television signals reach into Tyler from outside the market. Nor does the present study include the three TV signals from Houston, Texas that ARB reports as reaching the Tyler market but which we estimate obtain fewer than 100 viewing homes and were therefore dropped from our estimates for Tyler (see earlier discussion of cut-off criterion).

The principal reason for these differences with FCC figures is their use of the SMSA or "community of assignment" as their basis for organizing data, while the present study employed the ADI concept, discussed earlier.

Differences With Standard Industry Sources

Four factors built into the present analysis explain the differences in the size and ranking of some of the 204 markets when compared to other published sources. These include:

(1) The use of 1968/69 ADI definitions instead of 1969/70;

(2) The use of total homes instead of TV homes as the determinant of rank;

(3) The exclusion of Alaska and Hawaii from the present study;

(4) The joining of counties split between two markets and the assignment of ARB's non-ADI communities to an ADI market for the purposes of this analysis.

To illustrate, we use the Sacramento-Stockton, California market, which was the market most effected by these criteria. It is assigned an ADI rank of 25, and its number

of TV homes is 532,400 in the most recent ARB Television Market Analysis. In our study it ranks as the 29th market with 490,200 homes (not *TV* homes). This difference is explained in part by the use of ARB's 1969 market definition which consisted of 18 counties, whereas in 1969/70 ARB added 3 counties to the Sacramento market, a difference of about 4,000 homes. For purposes of this study two split counties were also shifted from Sacramento to San Francisco. The split counties are Contra Costa East (46,600), and Solano East (22,300). By employing the earlier definition and removing the split counties, this market is accorded a lower size and rank than given it by ARB (and the converse for San Francisco).

Another result of the criteria used in the organization of this market is the lower count of television stations received in the market, and the converse for San Francisco.

The 1968/69 definitions were used in the present study because some of the data were already available on the basis of the earlier market definitions. As an overall proposition, a reworking of the available data was not warranted.

In its Television Market Analysis (1969) ARB also lists 21 towns and cities not assigned an ADI designation but which its 1969 Coverage Study indicates are markets in themselves. These include the following:

1969/70

Non-ADI Markets	Home County TV Households
Worcester	180,600
Ft. Lauderdale	174,600
Akron	168,200
Palm Springs	137,000
Canton	108,500
Manchester	63,900
Modesto	54,800
Jamestown	48,900
Muskegon	47,600
Muncie	36,400
Tuscaloosa	31,500
Anderson	30,600
Parkersburg	28,300
Hickory	25,200
Marion	23,900
Fond Du Lac	22,200
Fayetville	21,500
Wildwood	18,500
Ft. Pierce	15,700
Bowling Green	15,100
Ft. Dodge	15,100
Jacksonville, Ill.	10,100

Since more than just the television media were involved in this study, these non-ADI markets are assigned to their nearest ADI. As a consequence, the markets to which these 21 communities are assigned may differ from the standard ARB market definition of size and rank. The foregoing list includes six communities not

so listed in 1968/69 and excludes four other communities that were treated as non-ADI markets in 1968/69.

These adjustments represent a relatively minor element in the overall plan of this study, but since they explain differences between the size and ranking of markets that will emerge with the use of other source material for further research, it is best that they be noted. An example of a radical change is the Lufkin, Texas market which consisted of three counties in 1968/69 but which was not included in the 1969/70 to surrounding ADI's. This instability in the definition of smaller television markets results from relatively minor shifts in TV viewing patterns that do not necessarily effect the other media.

Treatment of Television Satellite Stations

Another point worth noting in the computer program relates to television satellites. There are presently 42 "parent" stations which operate 55 satellite stations inside the continental United States. A satellite station generally has the same ownership as its parent and generally carries most of the same programming; however, it is generally a distinct operation in the physical sense of facilities and call letters.

Although 12 satellites operate across state lines from their parent stations, all except eight originate within the same ADI market as the parent station. The usual practice for ARB is to attribute all viewing of the parent and its satellites to the parent station if the satellite is in the same market. In the present study, a parent and its satellite(s) are treated as separate units, under joint ownership. This treatment of satellites is analogous to our treatment of newspapers where the morning and evening dailies published by the same owner under different mast-heads are treated as separate properties.

MAGAZINES INCLUDED IN MEDIA ANALYSIS

Publication	National Circulation
Business Week	555,498
Capper's Weekly	471,647
Catholic Digest	500,814
Cosmopolitan	1,023,707
Ebony	1,188,201
Esquire	1,027,254
Family Circle	7,053,606
Family Weekly	7,500,000
Field & Stream	1,591,044
First 3 Markets	5,100,000
Forbes	590,556
Fortune	504,435
Good Housekeeping	5,519,658
Grit	1,406,831
Ladies Home Journal	6,727,150
Life	8,586,565
Look Magazine	7,791,538
McCalls	8,334,553
Nation's Business	873,513
The New Yorker	418,890
Newsweek	2,616,229
Outdoor Life	1,609,370
Parent's Magazine	2,028,381
Playboy	4,473,249
Presbyterian Life	838,711

Publication	National Circulation
Reader's Digest	17,368,972
Redbook	4,538,779
Saturday Review	594,034
Southern Living	648,562
Sunset Magazine	985,289
Time	4,298,799
TV Guide	15,165,081
U.S. News & World Report	1,862,370
Woman's Day	7,761,605
Amer. Agr. & Rural NY	183,480
Colorado Rancher	45,480
Farm Journal	2,818,754
The Farmer	217,090
The Farmer-Stockman	398,953
Kansas Farmer	111,959
Michigan Farmer	97,990
Missouri Ruralist	136,827
Nebraska Farmer	95,447
The Ohio Farmer	107,399
Parade	16,250,000
Pennsylvania Farmer	99,519
Prairie Farmer	349,276
Progressive Farmer	1,183,559
Wallaces Farmer	206,228
Wisc. Agriculturist	123,655

MAGAZINES REJECTED THROUGH DATA AVAILABLE

Publication	National Circulation
Air Progress	101,415
American Home	3,505,863
Argosy	1,288,116
Better Homes & Gardens	7,740,238
Modern Bride	312,486
The Family Handyman	520,042
Glamour	1,414,063
Golf	400,323
Harpers Bazaar	457,724
Holiday	1,073,235
House Beautiful	930,038
House & Garden	1,216,288
Mademoiselle	648,240
Mechanix Illustrated	1,460,050
National Geographic	5,791,803
Popular Mechanics	1,792,696
Popular Science	1,558,450
Ski	265,646
Sports Afield	1,344,545
Sports Illustrated	1,989,346
Town and Country	110,690
Vogue	430,280

MARKET 001 NEW YORK,NEW YORK — HOMES: 6,041,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA				
OWNERS	610	519	91	15
	434	372	62	12
TV STATIONS	26	8	18	0
RADIO STATIONS	104	89	15	0
DAILY NEWSPAPERS	72	49	23	0
WEEKLY NEWSPAPERS	373	373	0	0
MAGAZINES	35	-	35	15

MARKET 002 LOS ANGELES,CALIFORNIA — HOMES: 3,452,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA				
OWNERS	419	362	58	15
	290	248	42	12
TV STATIONS	24	13	11	0
RADIO STATIONS	98	92	6	0
DAILY NEWSPAPERS	54	48	6	0
WEEKLY NEWSPAPERS	208	208	0	0
MAGAZINES	35	-	35	15

MARKET 003 CHICAGO, ILLINOIS HOMES: 2,580,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	482	402	80	14
OWNERS	279	224	55	12
TV STATIONS	28	9	19	0
RADIO STATIONS	88	78	10	0
DAILY NEWSPAPERS	54	40	14	0
WEEKLY NEWSPAPERS	275	275	0	0
MAGAZINES	37	-	37	14

MARKET 004 PHILADELPHIA, PENNSYLVANIA HOMES: 2,168,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	347	256	91	15
OWNERS	260	199	61	12
TV STATIONS	25	7	18	0
RADIO STATIONS	101	82	19	0
DAILY NEWSPAPERS	53	36	17	0
WEEKLY NEWSPAPERS	131	131	0	0
MAGAZINES	37	-	37	15

MARKET 005 SAN FRANCISCO, CALIFORNIA HOMES: 1,591,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	241	184	57	18
OWNERS	196	148	48	15
TV STATIONS	19	9	10	0
RADIO STATIONS	66	59	7	2
DAILY NEWSPAPERS	38	32	6	0
WEEKLY NEWSPAPERS	84	84	0	0
MAGAZINES	34	-	34	16

MARKET 006 BOSTON, MASSACHUSETTS HOMES: 1,508,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	336	257	79	15
OWNERS	247	190	57	12
TV STATIONS	24	8	16	0
RADIO STATIONS	85	68	17	0
DAILY NEWSPAPERS	53	41	12	0
WEEKLY NEWSPAPERS	140	140	0	0
MAGAZINES	34	-	34	15

MARKET 007 DETROIT,MICHIGAN HOMES: 1,423,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	233	171	62	13
OWNERS	167	118	49	11
TV STATIONS	13	6	7	0
RADIO STATIONS	55	43	12	0
DAILY NEWSPAPERS	20	11	9	0
WEEKLY NEWSPAPERS	111	111	0	0
MAGAZINES	34	-	34	13

MARKET 008 CLEVELAND,OHIO HOMES: 1,291,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	225	142	83	14
OWNERS	164	103	61	11
TV STATIONS	23	7	16	0
RADIO STATIONS	68	47	21	0
DAILY NEWSPAPERS,	37	26	11	0
WEEKLY NEWSPAPERS	62	62	0	0
MAGAZINES	35	-	35	14

MARKET 009 WASHINGTON,DC HOMES: 1,055,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	241	150	91	15
OWNERS	179	118	61	13
TV STATIONS	22	6	16	0
RADIO STATIONS	91	65	26	0
DAILY NEWSPAPERS	31	19	12	0
WEEKLY NEWSPAPERS	60	60	0	0
MAGAZINES	37	-	37	15

MARKET 010 PITTSBURGH,PENNSYLVANIA HOMES: 1,004,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	242	137	105	12
OWNERS	182	109	73	10
TV STATIONS	21	4	17	0
RADIO STATIONS	74	39	35	0
DAILY NEWSPAPERS	50	34	16	0
WEEKLY NEWSPAPERS	60	60	0	0
MAGAZINES	37	-	37	12

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MARKET 011 ST. LOUIS,MISSOURI HOMES: 891,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	260	182	78	14
OWNERS	219	159	60	11
TV STATIONS	16	5	11	0
RADIO STATIONS	59	42	17	0
DAILY NEWSPAPERS	27	14	13	0
WEEKLY NEWSPAPERS	121	121	0	0
MAGAZINES	37	-	37	14

MARKET 012 DALLAS-FT. WORTH,TEXAS HOMES: 863,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	259	187	72	18
OWNERS	214	158	56	15
TV STATIONS	16	7	9	0
RADIO STATIONS	66	49	17	1
DAILY NEWSPAPERS	40	31	9	0
WEEKLY NEWSPAPERS	100	100	0	0
MAGAZINES	37	-	37	17

MARKET 013 MINNEAPOLIS-ST PAUL,MINNESOTA HOMES: 747,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	306	219	87	16
OWNERS	251	187	64	14
TV STATIONS	15	4	11	0
RADIO STATIONS	72	43	29	1
DAILY NEWSPAPERS	23	10	13	0
WEEKLY NEWSPAPERS	162	162	0	0
MAGAZINES	34	-	34	15

MARKET 014 HOUSTON,TEXAS HOMES: 696,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	176	98	78	12
OWNERS	147	81	66	10
TV STATIONS	14	4	10	0
RADIO STATIONS	62	37	25	0
DAILY NEWSPAPERS	15	9	6	0
WEEKLY NEWSPAPERS	48	48	0	0
MAGAZINES	37	-	37	12

MARKET 015 INDIANAPOLIS, INDIANA HOMES: 685,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	252	152	100	18
OWNERS	195	124	71	15
TV STATIONS	27	7	20	0
RADIO STATIONS	81	47	34	2
DAILY NEWSPAPERS	47	35	12	1
WEEKLY NEWSPAPERS	63	63	0	0
MAGAZINES	34	-	34	15

MARKET 016 BALTIMORE, MARYLAND HOMES: 672,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	150	73	77	14
OWNERS	118	62	56	12
TV STATIONS	17	4	13	1
RADIO STATIONS	44	29	15	0
DAILY NEWSPAPERS	18	4	14	0
WEEKLY NEWSPAPERS	36	36	0	0
MAGAZINES	35	-	35	13

MARKET 017 SEATTLE-TACOMA, WASHINGTON HOMES: 671,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	206	146	60	15
OWNERS	164	118	46	13
TV STATIONS	10	5	5	0
RADIO STATIONS	64	50	14	0
DAILY NEWSPAPERS	17	11	6	0
WEEKLY NEWSPAPERS	80	80	0	0
MAGAZINES	35	-	35	15

MARKET 018 ATLANTA, GEORGIA HOMES: 671,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	243	155	88	13
OWNERS	201	131	70	11
TV STATIONS	17	5	12	0
RADIO STATIONS	104	71	33	0
DAILY NEWSPAPERS	18	10	8	0
WEEKLY NEWSPAPERS	69	69	0	0
MAGAZINES	35	-	35	13

MARKET 019 MIAMI, FLORIDA — HOMES: 618,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	113	62	51	14
OWNERS	100	60	40	12
TV STATIONS	11	6	5	0
RADIO STATIONS	40	35	5	1
DAILY NEWSPAPERS	16	9	7	0
WEEKLY NEWSPAPERS	12	12	0	0
MAGAZINES	34	-	34	13

MARKET 020 CINCINNATI, OHIO — HOMES: 599,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	190	100	90	13
OWNERS	153	84	69	11
TV STATIONS	22	4	18	0
RADIO STATIONS	62	28	34	1
DAILY NEWSPAPERS	10	7	3	0
WEEKLY NEWSPAPERS	61	61	0	0
MAGAZINES	35	-	35	12

MARKET 021 HARTFORD-NEW HAVEN, CONNECTICUT — HOMES: 584,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	146	79	67	18
OWNERS	121	71	50	15
TV STATIONS	20	5	15	2
RADIO STATIONS	35	28	7	0
DAILY NEWSPAPERS	28	16	12	1
WEEKLY NEWSPAPERS	30	30	0	0
MAGAZINES	33	-	33	15

MARKET 022 BUFFALO, NEW YORK — HOMES: 579,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	175	102	73	14
OWNERS	129	80	49	11
TV STATIONS	17	3	14	0
RADIO STATIONS	46	32	14	0
DAILY NEWSPAPERS	24	14	10	0
WEEKLY NEWSPAPERS	53	53	0	0
MAGAZINES	35	-	35	14

MARKET 023 MILWAUKEE,WISCONSIN HOMES: 565,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	166	97	69	15
OWNERS	130	79	51	12
TV STATIONS	15	4	11	0
RADIO STATIONS	44	28	16	2
DAILY NEWSPAPERS	15	8	7	0
WEEKLY NEWSPAPERS	57	57	0	0
MAGAZINES	35	-	35	13

MARKET 024 MEMPHIS,TENNESSEE HOMES: 552,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	234	144	90	11
OWNERS	194	126	68	9
TV STATIONS	16	4	12	0
RADIO STATIONS	86	57	29	0
DAILY NEWSPAPERS	24	12	12	0
WEEKLY NEWSPAPERS	71	71	0	0
MAGAZINES	37	-	37	11

MARKET 025 KANSAS CITY,MISSOURI HOMES: 543,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	201	124	77	14
OWNERS	167	105	62	12
TV STATIONS	11	4	7	0
RADIO STATIONS	45	23	22	0
DAILY NEWSPAPERS	28	18	10	0
WEEKLY NEWSPAPERS	79	79	0	0
MAGAZINES	38	-	38	14

MARKET 026 PORTLAND,OREGON HOMES: 535,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	204	134	70	17
OWNERS	171	117	54	14
TV STATIONS	17	5	12	0
RADIO STATIONS	67	53	14	1
DAILY NEWSPAPERS	21	12	9	0
WEEKLY NEWSPAPERS	64	64	0	0
MAGAZINES	35	-	35	16

MARKET 027 TAMPA-ST PETERSBURG,FLORIDA HOMES: 534,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	161	102	59	13
OWNERS	141	94	47	10
TV STATIONS	9	5	4	0
RADIO STATIONS	62	50	12	0
DAILY NEWSPAPERS	19	11	8	0
WEEKLY NEWSPAPERS	36	36	0	0
MAGAZINES	35	-	35	13

MARKET 028 NASHVILLE,TENNESSEE HOMES: 505,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	273	157	116	13
OWNERS	224	141	83	11
TV STATIONS	26	5	21	0
RADIO STATIONS	115	72	43	0
DAILY NEWSPAPERS	28	11	17	0
WEEKLY NEWSPAPERS	69	69	0	0
MAGAZINES	35	-	35	13

MARKET 029 SACRAMENTO-STOCKTON,CALIFORNIA HOMES: 490,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	182	109	73	17
OWNERS	147	88	59	14
TV STATIONS	20	5	15	0
RADIO STATIONS	57	40	17	1
DAILY NEWSPAPERS	20	14	6	1
WEEKLY NEWSPAPERS	50	50	0	0
MAGAZINES	35	-	35	15

MARKET 030 PROVIDENCE,RHODE ISLAND HOMES: 486,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	134	63	71	20
OWNERS	108	56	52	16
TV STATIONS	13	3	10	3
RADIO STATIONS	43	27	16	2
DAILY NEWSPAPERS	25	14	11	1
WEEKLY NEWSPAPERS	19	19	0	0
MAGAZINES	34	-	34	14

MARKET 031 CHARLESTON-HUNTINGTON,WEST VIRGINIA HOMES: 466,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	231	134	97	13
OWNERS	186	112	74	11
TV STATIONS	22	5	17	0
RADIO STATIONS	88	55	33	0
DAILY NEWSPAPERS	28	18	10	0
WEEKLY NEWSPAPERS	56	56	0	0
MAGAZINES	37	-	37	13

MARKET 032 DENVER,COLORADO HOMES: 461,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	170	112	58	16
OWNERS	146	98	48	14
TV STATIONS	10	4	6	0
RADIO STATIONS	49	40	9	2
DAILY NEWSPAPERS	20	12	8	0
WEEKLY NEWSPAPERS	56	56	0	0
MAGAZINES	35	-	35	14

506

MARKET 033 BIRMINGHAM,ALABAMA HOMES: 458,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	186	101	85	15
OWNERS	159	93	66	13
TV STATIONS	23	5	18	0
RADIO STATIONS	77	53	24	2
DAILY NEWSPAPERS	17	9	8	0
WEEKLY NEWSPAPERS	34	34	0	0
MAGAZINES	35	-	35	13

MARKET 034 NEW ORLEANS,LOUISIANA HOMES: 440,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	123	62	61	10
OWNERS	108	58	50	9
TV STATIONS	10	4	6	0
RADIO STATIONS	45	32	13	0
DAILY NEWSPAPERS	11	4	7	0
WEEKLY NEWSPAPERS	22	22	0	0
MAGAZINES	35	-	35	10

507

MARKET 035 CHARLOTTE,NORTH CAROLINA HOMES: 434,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	197	109	88	14
OWNERS	159	93	66	12
TV STATIONS	21	5	16	0
RADIO STATIONS	88	60	28	0
DAILY NEWSPAPERS	22	13	9	0
WEEKLY NEWSPAPERS	31	31	0	0
MAGAZINES	35	-	35	14

MARKET 036 COLUMBUS,OHIO HOMES: 433,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	192	85	107	15
OWNERS	147	71	76	13
TV STATIONS	19	3	16	0
RADIO STATIONS	63	22	41	1
DAILY NEWSPAPERS	32	17	15	0
WEEKLY NEWSPAPERS	43	43	0	0
MAGAZINES	35	-	35	14

MARKET 037 GRAND RAPIDS/KALAMAZOO,MICHIGAN HOMES: 414,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	201	115	86	20
OWNERS	162	99	63	17
TV STATIONS	21	4	17	0
RADIO STATIONS	65	41	24	1
DAILY NEWSPAPERS	25	14	11	1
WEEKLY NEWSPAPERS	56	56	0	0
MAGAZINES	34	-	34	18

MARKET 038 ALBANY-SCHENECTADY-TROY,NEW YORK HOMES: 413,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	153	79	74	16
OWNERS	118	61	57	12
TV STATIONS	22	4	18	0
RADIO STATIONS	38	25	13	0
DAILY NEWSPAPERS	26	17	9	1
WEEKLY NEWSPAPERS	33	33	0	0
MAGAZINES	34	-	34	15

MARKET 039 SAN DIEGO,CALIFORNIA HOMES: 412,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	98	48	50	19
OWNERS	82	41	41	16
TV STATIONS	13	5	8	0
RADIO STATIONS	20	17	3	3
DAILY NEWSPAPERS	9	5	4	0
WEEKLY NEWSPAPERS	21	21	0	0
MAGAZINES	35	-	35	16

MARKET 040 LOUISVILLE,KENTUCKY HOMES: 402,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	172	88	84	12
OWNERS	145	79	66	10
TV STATIONS	20	3	17	0
RADIO STATIONS	61	33	28	0
DAILY NEWSPAPERS	12	8	4	0
WEEKLY NEWSPAPERS	44	44	0	0
MAGAZINES	35	-	35	12

MARKET 041 GREENVILLE SPARTANBURG ASHEVILLE NC HOMES: 398,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	215	118	97	15
OWNERS	172	97	75	13
TV STATIONS	20	5	15	0
RADIO STATIONS	93	57	36	1
DAILY NEWSPAPERS	23	12	11	0
WEEKLY NEWSPAPERS	44	44	0	0
MAGAZINES	35	-	35	14

MARKET 042 OKLAHOMA CITY,OKLAHOMA HOMES: 392,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	254	165	89	17
OWNERS	199	131	68	16
TV STATIONS	17	3	14	0
RADIO STATIONS	59	29	30	2
DAILY NEWSPAPERS	32	24	8	0
WEEKLY NEWSPAPERS	109	109	0	0
MAGAZINES	37	-	37	15

MARKET 043 SYRACUSE,NEW YORK HOMES: 383,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	193	114	79	21
OWNERS	137	79	58	17
TV STATIONS	19	4	15	1
RADIO STATIONS	56	38	18	2
DAILY NEWSPAPERS	22	10	12	0
WEEKLY NEWSPAPERS	62	62	0	0
MAGAZINES	34	-	34	18

MARKET 044 DAYTON,OHIO HOMES: 376,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	152	61	92	17
OWNERS	121	52	69	15
TV STATIONS	21	5	16	0
RADIO STATIONS	43	12	31	3
DAILY NEWSPAPERS	25	16	9	0
WEEKLY NEWSPAPERS	27	27	0	0
MAGAZINES	36	-	36	14

MARKET 045 PHOENIX,ARIZONA HOMES: 371,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	161	99	62	14
OWNERS	134	82	52	12
TV STATIONS	14	5	9	0
RADIO STATIONS	55	45	10	1
DAILY NEWSPAPERS	14	6	8	0
WEEKLY NEWSPAPERS	43	43	0	0
MAGAZINES	35	-	35	13

MARKET 046 NORFOLK-PORTSMOUTH-NEWPORT-NEWS-HAMPTON,VAHOMES: 368,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	108	45	63	8
OWNERS	85	34	51	8
TV STATIONS	12	4	8	0
RADIO STATIONS	35	23	12	0
DAILY NEWSPAPERS	14	6	8	0
WEEKLY NEWSPAPERS	12	12	0	0
MAGAZINES	35	-	35	8

MARKET 047 SAN ANTONIO,TEXAS HOMES: 364,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	176	103	73	15
OWNERS	143	89	54	13
TV STATIONS	17	5	12	0
RADIO STATIONS	55	38	17	0
DAILY NEWSPAPERS	15	8	7	0
WEEKLY NEWSPAPERS	52	52	0	0
MAGAZINES	37	-	37	15

MARKET 048 HARRISBURG YORK LANCASTER LEBANON,PA HOMES: 351,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	135	63	72	19
OWNERS	102	51	51	16
TV STATIONS	21	5	16	0
RADIO STATIONS	33	23	10	0
DAILY NEWSPAPERS	22	11	11	0
WEEKLY NEWSPAPERS	24	24	0	0
MAGAZINES	35	-	35	19

MARKET 049 SALT LAKE CITY,UTAH HOMES: 340,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	196	118	78	14
OWNERS	161	97	64	11
TV STATIONS	16	3	13	0
RADIO STATIONS	62	42	20	0
DAILY NEWSPAPERS	18	9	9	0
WEEKLY NEWSPAPERS	64	64	0	0
MAGAZINES	36	-	36	14

MARKET 050 ORLANDO-DAYTONA BEACH,FLORIDA HOMES: 336,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	141	77	64	14
OWNERS	119	70	49	11
TV STATIONS	10	3	7	0
RADIO STATIONS	56	42	14	0
DAILY NEWSPAPERS	20	12	8	0
WEEKLY NEWSPAPERS	20	20	0	0
MAGAZINES	35	-	35	14

MARKET 051 TULSA OKLAHOMA HOMES: 333,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	206	114	92	13
OWNERS	159	94	65	11
TV STATIONS	16	4	12	0
RADIO STATIONS	60	32	28	0
DAILY NEWSPAPERS	32	18	14	0
WEEKLY NEWSPAPERS	60	60	0	0
MAGAZINES	38	-	38	13

MARKET 052 FLINT-SAGINAW-BAY CITY, MICHIGAN HOMES: 333,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	141	76	65	19
OWNERS	118	69	49	17
TV STATIONS	15	3	12	2
RADIO STATIONS	36	24	12	1
DAILY NEWSPAPERS	14	7	7	1
WEEKLY NEWSPAPERS	42	42	0	0
MAGAZINES	34	-	34	15

MARKET 053 GREENSBORO-WINSTON/SALEM, NORTH CAROLINA HOMES: 331,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	160	79	81	13
OWNERS	133	71	62	11
TV STATIONS	15	4	11	0
RADIO STATIONS	63	39	24	0
DAILY NEWSPAPERS	21	10	11	0
WEEKLY NEWSPAPERS	26	26	0	0
MAGAZINES	35	-	35	13

MARKET 054 WICHITA, KANSAS HOMES: 322,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	267	176	91	20
OWNERS	222	155	67	18
TV STATIONS	24	7	17	0
RADIO STATIONS	63	38	25	1
DAILY NEWSPAPERS	34	21	13	1
WEEKLY NEWSPAPERS	110	110	0	0
MAGAZINES	36	-	36	18

MARKET 055 SHREVEPORT-LA-TEXARKANA,TEXAS HOMES: 321,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	204	116	88	13
OWNERS	165	101	64	11
TV STATIONS	15	3	12	0
RADIO STATIONS	72	45	27	0
DAILY NEWSPAPERS	27	14	13	0
WEEKLY NEWSPAPERS	54	54	0	0
MAGAZINES	36	-	36	13

MARKET 056 LITTLE ROCK,ARKANSAS HOMES: 316,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	203	118	85	14
OWNERS	163	102	61	12
TV STATIONS	14	3	11	0
RADIO STATIONS	79	46	33	0
DAILY NEWSPAPERS	20	15	5	0
WEEKLY NEWSPAPERS	54	54	0	0
MAGAZINES	36	-	36	14

MARKET 057 RICHMOND,VIRGINIA HOMES: 308,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	154	68	86	16
OWNERS	128	63	65	12
TV STATIONS	15	3	12	0
RADIO STATIONS	64	33	31	1
DAILY NEWSPAPERS	13	5	8	0
WEEKLY NEWSPAPERS	27	27	0	0
MAGAZINES	35	-	35	15

MARKET 058 WILKES-BARRE-SCRANTON,PENNSYLVANIA HOMES: 298,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	131	62	69	15
OWNERS	112	58	54	12
TV STATIONS	23	3	20	0
RADIO STATIONS	33	28	5	0
DAILY NEWSPAPERS	24	15	9	0
WEEKLY NEWSPAPERS	16	16	0	0
MAGAZINES	35	-	35	15

MARKET 059 TOLEDO,OHIO — HOMES: 297,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	160	75	85	18
OWNERS	124	61	63	16
TV STATIONS	20	3	17	0
RADIO STATIONS	36	17	19	3
DAILY NEWSPAPERS	26	12	14	1
WEEKLY NEWSPAPERS	43	43	0	0
MAGAZINES	35	-	35	14

MARKET 060 JACKSONVILLE,FLORIDA — HOMES: 292,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	138	65	73	13
OWNERS	122	63	59	11
TV STATIONS	13	3	10	0
RADIO STATIONS	51	32	19	1
DAILY NEWSPAPERS	17	8	9	0
WEEKLY NEWSPAPERS	22	22	0	0
MAGAZINES	35	-	35	12

MARKET 061 KNOXVILLE,TENNESSEE — HOMES: 289,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	183	70	113	13
OWNERS	155	63	92	12
TV STATIONS	18	3	15	0
RADIO STATIONS	77	23	54	0
DAILY NEWSPAPERS	19	10	9	0
WEEKLY NEWSPAPERS	34	34	0	0
MAGAZINES	35	-	35	13

MARKET 062 MOBILE ALA.-PENSACOLA,FLORIDA — HOMES: 278,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	142	59	83	15
OWNERS	123	56	67	13
TV STATIONS	12	3	9	0
RADIO STATIONS	58	28	30	1
DAILY NEWSPAPERS	16	6	10	0
WEEKLY NEWSPAPERS	22	22	0	0
MAGAZINES	34	-	34	14

MARKET 063 ROANOKE-LYNCHBURG, VIRGINIA — HOMES: 271,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	181	83	98	17
OWNERS	150	72	78	15
TV STATIONS	19	4	15	0
RADIO STATIONS	72	37	35	3
DAILY NEWSPAPERS	25	12	13	0
WEEKLY NEWSPAPERS	30	30	0	0
MAGAZINES	35	-	35	14

MARKET 064 OMAHA, NEBRASKA — HOMES: 268,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	206	122	84	18
OWNERS	159	96	63	14
TV STATIONS	14	3	11	0
RADIO STATIONS	38	16	22	0
DAILY NEWSPAPERS	22	8	14	1
WEEKLY NEWSPAPERS	95	95	0	0
MAGAZINES	37	-	37	17

MARKET 065 DES MOINES, IOWA — HOMES: 267,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	229	147	82	15
OWNERS	179	119	60	13
TV STATIONS	16	4	12	0
RADIO STATIONS	54	27	27	0
DAILY NEWSPAPERS	21	13	8	0
WEEKLY NEWSPAPERS	103	103	0	0
MAGAZINES	35	-	35	15

MARKET 066 DAVENPORT, IOWA — HOMES: 266,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	198	103	95	21
OWNERS	157	90	67	17
TV STATIONS	20	3	17	0
RADIO STATIONS	50	19	31	4
DAILY NEWSPAPERS	23	12	11	1
WEEKLY NEWSPAPERS	69	69	0	0
MAGAZINES	36	-	36	16

MARKET 067 FRESNO-VISALIA, CALIFORNIA HOMES: 262,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	125	59	66	17
OWNERS	102	53	49	15
TV STATIONS	17	4	13	0
RADIO STATIONS	41	30	11	1
DAILY NEWSPAPERS	14	7	7	1
WEEKLY NEWSPAPERS	18	18	0	0
MAGAZINES	35	-	35	15

MARKET 068 RALEIGH-DURHAM, NORTH CAROLINA HOMES: 258,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	131	55	76	17
OWNERS	112	49	63	14
TV STATIONS	11	3	8	0
RADIO STATIONS	47	23	24	2
DAILY NEWSPAPERS	17	8	9	0
WEEKLY NEWSPAPERS	21	21	0	0
MAGAZINES	35	-	35	15

MARKET 069 CHAMPAIGN-DECATUR-SPRINGFIELD, ILLINOIS HOMES: 252,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	190	111	79	23
OWNERS	140	82	58	19
TV STATIONS	19	4	15	0
RADIO STATIONS	42	21	21	5
DAILY NEWSPAPERS	25	17	8	0
WEEKLY NEWSPAPERS	69	69	0	0
MAGAZINES	35	-	35	18

MARKET 070 ROCHESTER, NEW YORK HOMES: 252,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	103	50	53	13
OWNERS	74	31	43	11
TV STATIONS	12	3	9	0
RADIO STATIONS	17	13	4	0
DAILY NEWSPAPERS	11	4	7	0
WEEKLY NEWSPAPERS	30	30	0	0
MAGAZINES	33	-	33	13

MARKET 071 JACKSON, MISSISSIPPI HOMES: 242,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	175	85	90	11
OWNERS	138	72	66	10
TV STATIONS	16	2	14	1
RADIO STATIONS	73	39	34	2
DAILY NEWSPAPERS	15	6	9	0
WEEKLY NEWSPAPERS	38	38	0	0
MAGAZINES	33	-	33	8

MARKET 072 CEDAR RAPIDS-WATERLOO, IOWA HOMES: 242,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	199	112	87	20
OWNERS	157	94	63	16
TV STATIONS	18	3	15	0
RADIO STATIONS	39	16	23	2
DAILY NEWSPAPERS	21	8	13	1
WEEKLY NEWSPAPERS	85	85	0	0
MAGAZINES	36	-	36	17

MARKET 073 GREEN BAY, WISCONSIN HOMES: 238,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	148	80	68	21
OWNERS	113	68	45	16
TV STATIONS	14	5	9	0
RADIO STATIONS	44	27	17	2
DAILY NEWSPAPERS	16	10	6	2
WEEKLY NEWSPAPERS	38	38	0	0
MAGAZINES	36	-	36	17

MARKET 074 GREENVILLE-NEW BERN-WASH., NORTH CAROLINA HOMES: 235,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	142	68	74	19
OWNERS	117	60	57	17
TV STATIONS	12	3	9	2
RADIO STATIONS	56	37	19	2
DAILY NEWSPAPERS	21	10	11	1
WEEKLY NEWSPAPERS	18	18	0	0
MAGAZINES	35	-	35	14

MARKET 075 JOHNSTOWN-ALTOONA, PENNSYLVANIA HOMES: 233,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	163	79	84	22
OWNERS	125	63	62	17
TV STATIONS	21	3	18	2
RADIO STATIONS	47	33	14	1
DAILY NEWSPAPERS	32	15	17	1
WEEKLY NEWSPAPERS	28	28	0	0
MAGAZINES	35	-	35	18

MARKET 076 SPOKANE, WASHINGTON HOMES: 230,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	197	114	83	18
OWNERS	166	104	62	15
TV STATIONS	19	3	16	0
RADIO STATIONS	59	35	24	0
DAILY NEWSPAPERS	17	9	8	0
WEEKLY NEWSPAPERS	67	67	0	0
MAGAZINES	35	-	35	18

MARKET 077 CAPE GIRARDEAU, MISSOURI HOMES: 227,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	219	111	108	19
OWNERS	178	95	83	17
TV STATIONS	20	4	16	0
RADIO STATIONS	75	32	43	2
DAILY NEWSPAPERS	27	16	11	1
WEEKLY NEWSPAPERS	59	59	0	0
MAGAZINES	38	-	38	16

MARKET 078 PORTLAND-POLAND SPRING, MAINE HOMES: 221,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	141	70	71	16
OWNERS	113	60	53	14
TV STATIONS	11	3	8	0
RADIO STATIONS	45	26	19	1
DAILY NEWSPAPERS	20	10	10	0
WEEKLY NEWSPAPERS	31	31	0	0
MAGAZINES	34	-	34	15

MARKET 079 CHATTANOOGA,TENNESSEE HOMES: 214,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	147	57	90	18
OWNERS	124	53	71	16
TV STATIONS	16	3	13	0
RADIO STATIONS	54	22	32	5
DAILY NEWSPAPERS	16	6	10	0
WEEKLY NEWSPAPERS	26	26	0	0
MAGAZINES	35	-	35	13

MARKET 080 LINCOLN-HASTINGS-KEARNEY,NEBRASKA HOMES: 200,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	259	157	104	27
OWNERS	211	130	81	22
TV STATIONS	22	6	16	2
RADIO STATIONS	58	20	38	6
DAILY NEWSPAPERS	22	10	12	1
WEEKLY NEWSPAPERS	119	119	0	0
MAGAZINES	38	-	38	18

MARKET 081 ALBUQUERQUE,NEW MEXICO HOMES: 195,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	147	70	77	15
OWNERS	124	61	63	13
TV STATIONS	13	3	10	0
RADIO STATIONS	56	34	22	2
DAILY NEWSPAPERS	17	9	8	0
WEEKLY NEWSPAPERS	24	24	0	0
MAGAZINES	37	-	37	13

MARKET 082 SPRINGFIELD,MASSACHUSETTS HOMES: 189,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	90	31	59	20
OWNERS	72	26	46	16
TV STATIONS	15	3	12	1
RADIO STATIONS	20	14	6	3
DAILY NEWSPAPERS	13	5	8	1
WEEKLY NEWSPAPERS	9	9	0	0
MAGAZINES	33	-	33	15

MARKET 083 SIOUX FALLS-ABERDEEN, SOUTH DAKOTA HOMES: 182,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	283	180	105	23
OWNERS	224	148	76	18
TV STATIONS	25	6	19	0
RADIO STATIONS	64	23	41	5
DAILY NEWSPAPERS	17	7	10	1
WEEKLY NEWSPAPERS	142	142	0	0
MAGAZINES	35	-	35	17

MARKET 084 FORT WAYNE, INDIANA HOMES: 181,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	134	57	77	17
OWNERS	108	50	58	15
TV STATIONS	19	3	16	0
RADIO STATIONS	33	16	17	1
DAILY NEWSPAPERS	20	11	9	1
WEEKLY NEWSPAPERS	27	27	0	0
MAGAZINES	35	-	35	15

MARKET 085 BRISTOL VA. JOHNSON CITY, TENNESSEE HOMES: 178,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	142	57	85	19
OWNERS	119	50	69	17
TV STATIONS	23	3	20	2
RADIO STATIONS	50	28	22	1
DAILY NEWSPAPERS	16	8	8	1
WEEKLY NEWSPAPERS	18	18	0	0
MAGAZINES	35	-	35	15

MARKET 086 PEORIA, ILLINOIS HOMES: 173,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	133	67	66	18
OWNERS	97	47	50	15
TV STATIONS	12	3	9	0
RADIO STATIONS	25	12	13	1
DAILY NEWSPAPERS	14	5	9	0
WEEKLY NEWSPAPERS	47	47	0	0
MAGAZINES	35	-	35	17

MARKET 087 SOUTH BEND-ELKART, INDIANA HOMES: 165,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	119	46	73	22
OWNERS	88	36	52	18
TV STATIONS	12	3	9	0
RADIO STATIONS	32	13	19	5
DAILY NEWSPAPERS	17	7	10	1
WEEKLY NEWSPAPERS	23	23	0	0
MAGAZINES	35	-	35	16

MARKET 088 EVANSVILLE, INDIANA HOMES: 162,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	131	56	75	15
OWNERS	113	48	65	14
TV STATIONS	14	3	11	0
RADIO STATIONS	38	17	21	1
DAILY NEWSPAPERS	16	9	7	0
WEEKLY NEWSPAPERS	27	27	0	0
MAGAZINES	36	-	36	14

MARKET 089 DULUTH, MINNESOTA HOMES: 157,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	138	68	70	16
OWNERS	106	55	51	13
TV STATIONS	15	4	11	0
RADIO STATIONS	34	19	15	0
DAILY NEWSPAPERS	17	8	9	1
WEEKLY NEWSPAPERS	37	37	0	0
MAGAZINES	35	-	35	15

MARKET 090 AUGUSTA, GEORGIA HOMES: 157,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	164	75	89	15
OWNERS	135	68	67	14
TV STATIONS	18	3	15	0
RADIO STATIONS	56	27	29	1
DAILY NEWSPAPERS	15	4	11	1
WEEKLY NEWSPAPERS	41	41	0	0
MAGAZINES	34	-	34	13

MARKET 091 WEST PALM BEACH,FLORIDA HOMES: 156,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	109	44	65	20
OWNERS	91	39	52	17
TV STATIONS	12	3	9	3
RADIO STATIONS	33	21	12	2
DAILY NEWSPAPERS	12	3	9	1
WEEKLY NEWSPAPERS	17	17	0	0
MAGAZINES	35	-	35	14

MARKET 092 AMARILLO,TEXAS HOMES: 155,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	172	95	79	15
OWNERS	145	81	64	14
TV STATIONS	18	6	12	0
RADIO STATIONS	54	31	23	1
DAILY NEWSPAPERS	18	10	8	0
WEEKLY NEWSPAPERS	46	46	0	0
MAGAZINES	36	-	36	14

MARKET 093 SALINAS-MONTEREY,CALIFORNIA HOMES: 155,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	123	44	79	24
OWNERS	99	38	61	19
TV STATIONS	19	4	15	3
RADIO STATIONS	36	17	19	3
DAILY NEWSPAPERS	17	7	10	2
WEEKLY NEWSPAPERS	16	16	0	0
MAGAZINES	35	-	35	16

MARKET 094 SPRINGFIELD,MISSOURI HOMES: 155,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	199	94	105	15
OWNERS	151	70	81	14
TV STATIONS	21	3	18	0
RADIO STATIONS	59	23	36	0
DAILY NEWSPAPERS	21	7	14	0
WEEKLY NEWSPAPERS	61	61	0	0
MAGAZINES	37	-	37	15

MARKET 095 FARGO,NORTH DAKOTA HOMES: 153,90

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	162	99	63	20
OWNERS	137	88	49	16
TV STATIONS	9	4	5	0
RADIO STATIONS	39	20	19	3
DAILY NEWSPAPERS	12	7	5	1
WEEKLY NEWSPAPERS	68	68	0	0
MAGAZINES	34	-	34	16

MARKET 096 BATON ROUGE,LOUISIANA HOMES: 153,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	110	45	65	16
OWNERS	90	36	54	15
TV STATIONS	9	2	7	0
RADIO STATIONS	31	14	17	4
DAILY NEWSPAPERS	11	4	7	0
WEEKLY NEWSPAPERS	25	25	0	0
MAGAZINES	34	-	34	12

MARKET 097 LANSING,MICHIGAN HOMES: 153,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	97	31	66	22
OWNERS	78	26	52	18
TV STATIONS	15	2	13	2
RADIO STATIONS	21	10	11	2
DAILY NEWSPAPERS	11	3	8	1
WEEKLY NEWSPAPERS	16	16	0	0
MAGAZINES	34	-	34	17

MARKET 098 ROCKFORD,ILLINOIS HOMES: 151,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	116	47	69	23
OWNERS	95	40	55	20
TV STATIONS	18	3	15	1
RADIO STATIONS	32	19	13	6
DAILY NEWSPAPERS	12	6	6	0
WEEKLY NEWSPAPERS	19	19	0	0
MAGAZINES	35	-	35	16

MARKET 099 COLUMBUS, GEORGIA — HOMES: 151,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	129	43	86	12
OWNERS	99	32	67	12
TV STATIONS	12	2	10	0
RADIO STATIONS	48	16	32	1
DAILY NEWSPAPERS	15	5	10	0
WEEKLY NEWSPAPERS	20	20	0	0
MAGAZINES	34	-	34	11

MARKET 100 COLUMBIA, SOUTH CAROLINA — HOMES: 150,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	102	32	70	13
OWNERS	84	27	57	11
TV STATIONS	13	3	10	0
RADIO STATIONS	38	17	21	0
DAILY NEWSPAPERS	9	4	5	0
WEEKLY NEWSPAPERS	8	8	0	0
MAGAZINES	34	-	34	13

MARKET 101 WHEELING W VA-STEUBENVILLE, OHIO — HOMES: 148,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	119	40	79	17
OWNERS	95	34	61	14
TV STATIONS	20	2	18	3
RADIO STATIONS	27	11	16	1
DAILY NEWSPAPERS	17	8	9	0
WEEKLY NEWSPAPERS	19	19	0	0
MAGAZINES	36	-	36	13

MARKET 102 WACO-TEMPLE, TEXAS — HOMES: 147,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	140	55	85	17
OWNERS	111	48	63	15
TV STATIONS	15	3	12	2
RADIO STATIONS	38	13	25	1
DAILY NEWSPAPERS	18	7	11	0
WEEKLY NEWSPAPERS	32	32	0	0
MAGAZINES	37	-	37	14

MARKET 103 WICHITA FALLS, TEXAS-LAWTON, OKLAHOMA HOMES: 147,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	146	72	74	18
OWNERS	116	63	53	16
TV STATIONS	12	3	9	0
RADIO STATIONS	35	17	18	3
DAILY NEWSPAPERS	19	9	10	1
WEEKLY NEWSPAPERS	43	43	0	0
MAGAZINES	37	-	37	14

MARKET 104 EL PASO, TEXAS HOMES: 143,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	90	34	56	16
OWNERS	76	29	47	13
TV STATIONS	13	3	10	0
RADIO STATIONS	26	17	9	2
DAILY NEWSPAPERS	6	5	1	0
WEEKLY NEWSPAPERS	9	9	0	0
MAGAZINES	36	-	36	14

MARKET 105 TERRE HAUTE, INDIANA HOMES: 143,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	178	75	103	22
OWNERS	146	70	76	21
TV STATIONS	18	2	16	2
RADIO STATIONS	58	18	40	5
DAILY NEWSPAPERS	29	17	12	1
WEEKLY NEWSPAPERS	38	38	0	0
MAGAZINES	35	-	35	14

MARKET 106 HUNTSVILLE-DECATUR-FLORENCE, ALABAMA HOMES: 141,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	96	40	56	18
OWNERS	80	34	46	16
TV STATIONS	13	4	9	1
RADIO STATIONS	28	23	5	1
DAILY NEWSPAPERS	11	4	7	1
WEEKLY NEWSPAPERS	9	9	0	0
MAGAZINES	35	-	35	15

MARKET 107 BEAUMONT-PORT ARTHUR,TEXAS HOMES: 141,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	103	35	68	12
OWNERS	90	33	57	10
TV STATIONS	13	3	10	0
RADIO STATIONS	34	15	19	0
DAILY NEWSPAPERS	8	4	4	0
WEEKLY NEWSPAPERS	13	13	0	0
MAGAZINES	35	-	35	12

MARKET 108 MADISON,WISCONSIN HOMES: 140,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	142	66	76	19
OWNERS	116	58	58	17
TV STATIONS	17	3	14	0
RADIO STATIONS	34	16	18	2
DAILY NEWSPAPERS	14	5	9	0
WEEKLY NEWSPAPERS	42	42	0	0
MAGAZINES	35	-	35	17

MARKET 109 MONROE LA-EL DORADO,ARKANSAS HOMES: 139,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	122	49	73	12
OWNERS	105	46	59	11
TV STATIONS	13	2	11	0
RADIO STATIONS	43	23	20	1
DAILY NEWSPAPERS	14	6	8	1
WEEKLY NEWSPAPERS	18	18	0	0
MAGAZINES	34	-	34	10

MARKET 110 COLORADO SPRINGS-PUEBLO,COLORADO HOMES: 138,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	121	55	66	22
OWNERS	104	51	53	19
TV STATIONS	10	3	7	0
RADIO STATIONS	42	20	22	3
DAILY NEWSPAPERS	11	9	2	2
WEEKLY NEWSPAPERS	23	23	0	0
MAGAZINES	35	-	35	17

MARKET 111 TUCSON, ARIZONA — HOMES: 138,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	97	38	59	16
OWNERS	84	35	49	14
TV STATIONS	11	4	7	0
RADIO STATIONS	30	18	12	1
DAILY NEWSPAPERS	11	5	6	0
WEEKLY NEWSPAPERS	11	11	0	0
MAGAZINES	34	-	34	15

MARKET 112 BINGHAMTON, NEW YORK — HOMES: 138,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	129	39	90	20
OWNERS	108	35	73	18
TV STATIONS	21	3	18	0
RADIO STATIONS	36	10	26	3
DAILY NEWSPAPERS	19	5	14	1
WEEKLY NEWSPAPERS	21	21	0	0
MAGAZINES	32	-	32	16

MARKET 113 CHARLESTON, SOUTH CAROLINA — HOMES: 138,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	91	31	60	11
OWNERS	78	29	49	10
TV STATIONS	9	3	6	0
RADIO STATIONS	31	18	13	0
DAILY NEWSPAPERS	8	2	6	0
WEEKLY NEWSPAPERS	8	8	0	0
MAGAZINES	35	-	35	11

MARKET 114 BURLINGTON VT.-PLATTSBURG, NEW YORK — HOMES: 136,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	119	47	72	21
OWNERS	97	43	54	19
TV STATIONS	17	3	14	1
RADIO STATIONS	30	20	10	1
DAILY NEWSPAPERS	22	8	14	0
WEEKLY NEWSPAPERS	16	16	0	0
MAGAZINES	34	-	34	19

MARKET 115 MONTGOMERY, ALABAMA — HOMES: 134,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	106	40	66	11
OWNERS	95	39	56	11
TV STATIONS	13	3	10	0
RADIO STATIONS	38	20	18	1
DAILY NEWSPAPERS	8	4	4	0
WEEKLY NEWSPAPERS	13	13	0	0
MAGAZINES	34	-	34	10

MARKET 116 SIOUX CITY, IOWA — HOMES: 133,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	194	112	82	24
OWNERS	160	99	61	21
TV STATIONS	16	3	13	1
RADIO STATIONS	44	17	27	4
DAILY NEWSPAPERS	13	6	7	2
WEEKLY NEWSPAPERS	86	86	0	0
MAGAZINES	35	-	35	17

MARKET 117 YOUNGSTOWN, OHIO — HOMES: 133,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	83	27	56	16
OWNERS	68	22	46	14
TV STATIONS	13	3	10	0
RADIO STATIONS	16	10	6	4
DAILY NEWSPAPERS	10	5	5	0
WEEKLY NEWSPAPERS	9	9	0	0
MAGAZINES	35	-	35	12

MARKET 118 UTICA, NEW YORK — HOMES: 132,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	90	28	62	24
OWNERS	73	27	46	19
TV STATIONS	15	1	14	3
RADIO STATIONS	19	11	8	3
DAILY NEWSPAPERS	12	6	6	1
WEEKLY NEWSPAPERS	10	10	0	0
MAGAZINES	34	-	34	17

MARKET 119 JOPLIN,MISSOURI HOMES: 131,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	171	83	88	20
OWNERS	133	71	62	18
TV STATIONS	14	3	11	0
RADIO STATIONS	41	17	24	2
DAILY NEWSPAPERS	30	16	14	1
WEEKLY NEWSPAPERS	47	47	0	0
MAGAZINES	39	-	39	17

MARKET 120 LAFAYETTE,LOUISIANA HOMES: 128,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	93	32	61	16
OWNERS	77	29	48	15
TV STATIONS	10	3	7	3
RADIO STATIONS	28	13	15	3
DAILY NEWSPAPERS	11	5	6	1
WEEKLY NEWSPAPERS	11	11	0	0
MAGAZINES	33	-	33	9

MARKET 121 CORPUS CHRISTI,TEXAS HOMES: 125,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	89	42	47	12
OWNERS	73	34	39	11
TV STATIONS	6	3	3	0
RADIO STATIONS	19	14	5	1
DAILY NEWSPAPERS	7	3	4	0
WEEKLY NEWSPAPERS	22	22	0	0
MAGAZINES	35	-	35	11

MARKET 122 QUINCY,ILLINOIS HOMES: 122,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	171	78	93	28
OWNERS	133	62	71	25
TV STATIONS	18	3	15	0
RADIO STATIONS	41	14	27	8
DAILY NEWSPAPERS	22	9	13	1
WEEKLY NEWSPAPERS	52	52	0	0
MAGAZINES	38	-	38	19

MARKET 123 YAKIMA, WASHINGTON — HOMES: 121,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	102	53	50	16
OWNERS	83	43	40	14
TV STATIONS	16	5	11	2
RADIO STATIONS	27	24	3	1
DAILY NEWSPAPERS	7	5	2	0
WEEKLY NEWSPAPERS	18	18	0	0
MAGAZINES	34	-	34	13

MARKET 124 LEXINGTON, KENTUCKY — HOMES: 120,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	104	37	67	18
OWNERS	90	34	56	15
TV STATIONS	13	3	10	0
RADIO STATIONS	36	14	22	3
DAILY NEWSPAPERS	8	6	2	1
WEEKLY NEWSPAPERS	14	14	0	0
MAGAZINES	33	-	33	14

MARKET 125 LUBBOCK, TEXAS — HOMES: 120,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	131	59	72	16
OWNERS	103	49	54	15
TV STATIONS	16	5	11	0
RADIO STATIONS	37	22	15	2
DAILY NEWSPAPERS	12	3	9	0
WEEKLY NEWSPAPERS	29	29	0	0
MAGAZINES	37	-	37	14

MARKET 126 COLUMBIA-JEFFERSON CITY, MISSOURI — HOMES: 117,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	142	65	77	25
OWNERS	111	52	59	21
TV STATIONS	16	3	13	0
RADIO STATIONS	35	15	20	2
DAILY NEWSPAPERS	19	11	8	4
WEEKLY NEWSPAPERS	36	36	0	0
MAGAZINES	36	-	36	19

MARKET 127 ODESSA-MIDLAND,TEXAS HOMES: 115,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	128	42	86	19
OWNERS	107	40	67	17
TV STATIONS	12	3	9	1
RADIO STATIONS	47	14	33	4
DAILY NEWSPAPERS	10	3	7	2
WEEKLY NEWSPAPERS	22	22	0	0
MAGAZINES	37	-	37	12

MARKET 128 MINOT-BISMARCK,NORTH DAKOTA HOMES: 112,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	195	110	85	18
OWNERS	156	92	64	16
TV STATIONS	19	7	12	0
RADIO STATIONS	49	19	30	2
DAILY NEWSPAPERS	14	5	9	0
WEEKLY NEWSPAPERS	79	79	0	0
MAGAZINES	34	-	34	16

MARKET 129 AUSTIN,TEXAS HOMES: 111,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	117	39	78	19
OWNERS	94	36	58	15
TV STATIONS	14	2	12	0
RADIO STATIONS	34	14	20	2
DAILY NEWSPAPERS	12	3	9	0
WEEKLY NEWSPAPERS	20	20	0	0
MAGAZINES	37	-	37	17

MARKET 130 TOPEKA,KANSAS HOMES: 109,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	130	56	74	28
OWNERS	107	47	60	23
TV STATIONS	12	2	10	3
RADIO STATIONS	30	9	21	4
DAILY NEWSPAPERS	15	8	7	2
WEEKLY NEWSPAPERS	37	37	0	0
MAGAZINES	36	-	36	19

MARKET 131 SAVANNAH, GEORGIA HOMES: 108,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	93	28	65	15
OWNERS	80	25	55	13
TV STATIONS	11	2	9	0
RADIO STATIONS	30	13	17	2
DAILY NEWSPAPERS	7	2	5	0
WEEKLY NEWSPAPERS	11	11	0	0
MAGAZINES	34	-	34	13

MARKET 132 EUGENE, OREGON HOMES: 108,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	91	43	48	20
OWNERS	80	40	40	16
TV STATIONS	10	4	6	1
RADIO STATIONS	24	20	4	1
DAILY NEWSPAPERS	6	3	3	1
WEEKLY NEWSPAPERS	16	16	0	0
MAGAZINES	35	-	35	17

MARKET 133 MACON, GEORGIA HOMES: 107,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	84	31	53	16
OWNERS	70	28	42	15
TV STATIONS	10	2	8	2
RADIO STATIONS	24	15	9	1
DAILY NEWSPAPERS	4	2	2	0
WEEKLY NEWSPAPERS	12	12	0	0
MAGAZINES	34	-	34	13

MARKET 134 BAKERSFIELD, CALIFORNIA HOMES: 107,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	85	31	54	18
OWNERS	74	29	45	15
TV STATIONS	15	3	12	1
RADIO STATIONS	16	14	2	1
DAILY NEWSPAPERS	7	2	5	2
WEEKLY NEWSPAPERS	12	12	0	0
MAGAZINES	35	-	35	14

MARKET 135 LA CROSSE-EAU CLAIRE, WISCONSIN HOMES: 106,40(

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	150	68	82	20
OWNERS	113	57	56	17
TV STATIONS	18	3	15	1
RADIO STATIONS	39	19	20	3
DAILY NEWSPAPERS	17	5	12	0
WEEKLY NEWSPAPERS	41	41	0	0
MAGAZINES	35	-	35	16

MARKET 136 ABILENE-SWEETWATER, TEXAS HOMES: 105,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	136	54	82	19
OWNERS	107	47	60	18
TV STATIONS	16	3	13	1
RADIO STATIONS	39	13	26	4
DAILY NEWSPAPERS	11	5	6	0
WEEKLY NEWSPAPERS	33	33	0	0
MAGAZINES	37	-	37	18

MARKET 137 ROCHESTER MINN-MASON CITY, IOWA HOMES: 104,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	130	40	90	28
OWNERS	100	34	66	22
TV STATIONS	15	3	12	0
RADIO STATIONS	38	5	33	11
DAILY NEWSPAPERS	15	5	10	2
WEEKLY NEWSPAPERS	27	27	0	0
MAGAZINES	35	-	35	15

MARKET 138 TALLAHASSEE, FLORIDA HOMES: 103,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	125	45	80	17
OWNERS	107	44	63	15
TV STATIONS	8	1	7	2
RADIO STATIONS	54	23	31	2
DAILY NEWSPAPERS	11	3	8	1
WEEKLY NEWSPAPERS	18	18	0	0
MAGAZINES	34	-	34	12

MARKET 139 ERIE, PENNSYLVANIA — HOMES: 102,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	78	22	56	17
OWNERS	66	18	48	15
TV STATIONS	14	3	11	0
RADIO STATIONS	17	11	6	1
DAILY NEWSPAPERS	10	5	5	0
WEEKLY NEWSPAPERS	3	3	0	0
MAGAZINES	34	-	34	16

MARKET 140 WILMINGTON, NORTH CAROLINA — HOMES: 99,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	104	33	71	21
OWNERS	91	30	61	19
TV STATIONS	13	2	11	1
RADIO STATIONS	32	14	18	5
DAILY NEWSPAPERS	11	3	8	1
WEEKLY NEWSPAPERS	14	14	0	0
MAGAZINES	34	-	34	14

MARKET 141 LOWER RIO GRANDE VALLEY, TEXAS — HOMES: 97,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	70	27	43	9
OWNERS	57	21	36	8
TV STATIONS	6	2	4	0
RADIO STATIONS	10	9	1	0
DAILY NEWSPAPERS	8	4	4	1
WEEKLY NEWSPAPERS	12	12	0	0
MAGAZINES	34	-	34	8

MARKET 142 CHICO-REDDING, CALIFORNIA — HOMES: 97,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.
MEDIA	115	39	76	25
OWNERS	98	38	60	23
TV STATIONS	16	2	14	1
RADIO STATIONS	36	17	19	7
DAILY NEWSPAPERS	16	7	9	2
WEEKLY NEWSPAPERS	13	13	0	0
MAGAZINES	34	-	34	15

MARKET 143 LAS VEGAS,NEVADA HOMES: 95,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	70	22	48	13
OWNERS	56	19	37	10
TV STATIONS	7	4	3	0
RADIO STATIONS	15	11	4	0
DAILY NEWSPAPERS	9	2	7	0
WEEKLY NEWSPAPERS	5	5	0	0
MAGAZINES	34	-	34	13

MARKET 144 WAUSAU-RHINELANDER,WISCONSIN HOMES: 95,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	113	43	70	19
OWNERS	88	35	53	16
TV STATIONS	9	2	7	2
RADIO STATIONS	31	13	18	0
DAILY NEWSPAPERS	17	7	10	2
WEEKLY NEWSPAPERS	21	21	0	0
MAGAZINES	35	-	35	15

MARKET 145 TRAVERSE CITY-CADILLAC MICHIGAN HOMES: 91,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	145	66	79	23
OWNERS	120	57	63	21
TV STATIONS	15	4	11	0
RADIO STATIONS	47	13	29	2
DAILY NEWSPAPERS	15	9	6	2
WEEKLY NEWSPAPERS	35	35	0	0
MAGAZINES	33	-	33	19

MARKET 146 BOISE,IDAHO HOMES: 91,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	92	44	48	18
OWNERS	79	40	39	15
TV STATIONS	10	3	7	0
RADIO STATIONS	21	17	4	1
DAILY NEWSPAPERS	6	4	2	0
WEEKLY NEWSPAPERS	20	20	0	0
MAGAZINES	35	-	35	17

MARKET 147 SANTA BARBARA, CALIFORNIA HOMES: 86,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	72	20	52	25
OWNERS	64	19	45	23
TV STATIONS	13	2	11	6
RADIO STATIONS	14	11	3	3
DAILY NEWSPAPERS	6	3	3	1
WEEKLY NEWSPAPERS	4	4	0	0
MAGAZINES	35	-	35	15

MARKET 148 ALBANY, GEORGIA HOMES: 80,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	118	42	76	17
OWNERS	97	39	58	15
TV STATIONS	10	1	9	3
RADIO STATIONS	48	19	29	0
DAILY NEWSPAPERS	9	3	6	2
WEEKLY NEWSPAPERS	19	19	0	0
MAGAZINES	32	-	32	12

MARKET 149 BANGOR, MAINE HOMES: 80,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	77	30	47	16
OWNERS	65	28	37	14
TV STATIONS	6	3	3	0
RADIO STATIONS	16	11	5	1
DAILY NEWSPAPERS	8	1	7	1
WEEKLY NEWSPAPERS	15	15	0	0
MAGAZINES	32	-	32	14

MARKET 150 FLORENCE, SOUTH CAROLINA HOMES: 77,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	95	30	65	17
OWNERS	83	29	54	16
TV STATIONS	14	1	13	1
RADIO STATIONS	29	15	14	1
DAILY NEWSPAPERS	9	1	8	3
WEEKLY NEWSPAPERS	13	13	0	0
MAGAZINES	30	-	30	12

MARKET 151 MERIDIAN, MISSISSIPPI — HOMES: 76,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	109	30	79	10
OWNERS	87	27	60	10
TV STATIONS	15	2	13	2
RADIO STATIONS	36	11	25	2
DAILY NEWSPAPERS	13	1	12	0
WEEKLY NEWSPAPERS	16	16	0	0
MAGAZINES	29	-	29	6

MARKET 152 DOTHAN, ALABAMA — HOMES: 74,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	106	30	76	20
OWNERS	89	27	62	18
TV STATIONS	8	1	7	2
RADIO STATIONS	33	13	20	2
DAILY NEWSPAPERS	15	2	13	2
WEEKLY NEWSPAPERS	14	14	0	0
MAGAZINES	36	-	36	14

MARKET 153 BLUEFIELD, WEST VIRGINIA — HOMES: 73,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	86	27	59	22
OWNERS	70	24	46	20
TV STATIONS	9	1	8	5
RADIO STATIONS	22	10	12	3
DAILY NEWSPAPERS	11	4	7	2
WEEKLY NEWSPAPERS	12	12	0	0
MAGAZINES	32	-	32	12

MARKET 154 RENO, NEVADA — HOMES: 70,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	113	29	84	20
OWNERS	87	24	63	17
TV STATIONS	17	3	14	0
RADIO STATIONS	37	11	26	2
DAILY NEWSPAPERS	14	4	10	1
WEEKLY NEWSPAPERS	11	11	0	0
MAGAZINES	34	-	34	17

MARKET 155 WATERTOWN-CARTHAGE, NEW YORK HOMES: 70,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	74	19	55	23
OWNERS	60	14	46	20
TV STATIONS	10	1	9	2
RADIO STATIONS	15	8	7	2
DAILY NEWSPAPERS	7	2	5	1
WEEKLY NEWSPAPERS	8	8	0	0
MAGAZINES	34	-	34	18

MARKET 156 CHEYENNE, WYOMING HOMES: 64,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	114	45	69	26
OWNERS	96	38	53	21
TV STATIONS	13	3	10	3
RADIO STATIONS	31	13	18	3
DAILY NEWSPAPERS	11	6	5	3
WEEKLY NEWSPAPERS	23	23	0	0
MAGAZINES	36	-	36	17

MARKET 157 ALEXANDRIA, MINNESOTA HOMES: 64,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	136	65	73	25
OWNERS	108	54	54	19
TV STATIONS	12	2	10	1
RADIO STATIONS	35	10	25	7
DAILY NEWSPAPERS	10	3	7	2
WEEKLY NEWSPAPERS	50	50	0	0
MAGAZINES	31	-	31	15

MARKET 158 FORT SMITH, ARKANSAS HOMES: 61,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	91	35	56	15
OWNERS	73	29	44	14
TV STATIONS	7	1	6	2
RADIO STATIONS	16	10	6	0
DAILY NEWSPAPERS	9	2	7	0
WEEKLY NEWSPAPERS	22	22	0	0
MAGAZINES	37	-	37	13

MARKET 159 BILLINGS, MONTANA HOMES: 61,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	104	44	60	20
OWNERS	88	40	48	18
TV STATIONS	12	2	10	0
RADIO STATIONS	29	16	13	2
DAILY NEWSPAPERS	8	8	8	0
WEEKLY NEWSPAPERS	22	22	0	0
MAGAZINES	33	-	33	18

MARKET 160 IDAHO FALLS-POCATELLO, IDAHO HOMES: 59,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	92	36	56	19
OWNERS	76	31	45	16
TV STATIONS	9	3	6	0
RADIO STATIONS	22	12	10	2
DAILY NEWSPAPERS	9	3	6	1
WEEKLY NEWSPAPERS	18	18	0	0
MAGAZINES	34	-	34	16

MARKET 161 ST. JOSEPH, MISSOURI HOMES: 58,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	104	24	80	24
OWNERS	78	22	56	20
TV STATIONS	13	1	12	3
RADIO STATIONS	23	5	18	5
DAILY NEWSPAPERS	14	3	11	2
WEEKLY NEWSPAPERS	15	15	0	0
MAGAZINES	39	-	39	14

MARKET 162 COLUMBUS, MISSISSIPPI HOMES: 57,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	90	25	65	15
OWNERS	73	23	50	15
TV STATIONS	11	1	10	1
RADIO STATIONS	26	10	16	4
DAILY NEWSPAPERS	10	3	7	2
WEEKLY NEWSPAPERS	11	11	0	0
MAGAZINES	32	-	32	8

MARKET 163 GREAT FALLS,MONTANA HOMES: 56,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	80	25	55	21
OWNERS	68	23	45	19
TV STATIONS	11	2	9	0
RADIO STATIONS	15	3	12	5
DAILY NEWSPAPERS	4	3	1	0
WEEKLY NEWSPAPERS	17	17	0	0
MAGAZINES	33	-	33	16

MARKET 164 ALEXANDRIA,LOUISIANA HOMES: 55,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	69	13	56	16
OWNERS	58	11	47	16
TV STATIONS	10	1	9	3
RADIO STATIONS	12	5	7	2
DAILY NEWSPAPERS	9	1	8	1
WEEKLY NEWSPAPERS	6	6	0	0
MAGAZINES	32	-	32	10

MARKET 165 LAUREL-HATTIESBURG,MISSISSIPPI HOMES: 50,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	68	16	52	13
OWNERS	55	16	39	13
TV STATIONS	8	1	7	3
RADIO STATIONS	16	9	7	3
DAILY NEWSPAPERS	7	2	5	1
WEEKLY NEWSPAPERS	4	4	0	0
MAGAZINES	33	-	33	6

MARKET 166 CLARKSBURG-WESTON,WEST VIRGINIA HOMES: 50,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	75	27	48	17
OWNERS	65	24	41	15
TV STATIONS	9	2	7	3
RADIO STATIONS	13	7	6	2
DAILY NEWSPAPERS	7	6	1	0
WEEKLY NEWSPAPERS	12	12	0	0
MAGAZINES	34	-	34	12

MARKET 167 LAKE CHARLES,LOUISIANA HOMES: 50,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	47	6	41	16
OWNERS	41	5	36	15
TV STATIONS	6	1	5	5
RADIO STATIONS	6	4	2	2
DAILY NEWSPAPERS	5	1	4	0
WEEKLY NEWSPAPERS	0	0	0	0
MAGAZINES	30	-	30	9

MARKET 168 MARQUETTE,MICHIGAN HOMES: 49,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	78	26	52	23
OWNERS	65	22	43	19
TV STATIONS	6	1	5	2
RADIO STATIONS	17	10	7	1
DAILY NEWSPAPERS	8	3	5	3
WEEKLY NEWSPAPERS	12	12	0	0
MAGAZINES	35	-	35	17

MARKET 169 RAPID CITY,SOUTH DAKOTA HOMES: 48,700

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	113	43	72	17
OWNERS	90	32	58	14
TV STATIONS	13	5	8	0
RADIO STATIONS	33	10	23	1
DAILY NEWSPAPERS	9	3	6	0
WEEKLY NEWSPAPERS	23	23	0	0
MAGAZINES	35	-	35	16

MARKET 170 MANKATO,MINNESOTA HOMES: 48,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	122	48	74	27
OWNERS	99	44	55	20
TV STATIONS	14	1	13	2
RADIO STATIONS	27	8	19	7
DAILY NEWSPAPERS	13	3	10	3
WEEKLY NEWSPAPERS	36	36	0	0
MAGAZINES	32	-	32	15

MARKET 171 OTTUMWA, IOWA — HOMES: 48,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	103	29	74	25
OWNERS	81	22	59	21
TV STATIONS	15	1	14	3
RADIO STATIONS	25	7	18	5
DAILY NEWSPAPERS	13	4	9	2
WEEKLY NEWSPAPERS	17	17	0	0
MAGAZINES	33	-	33	15

MARKET 172 ARDMORE-ADA, OKLAHOMA — HOMES: 46,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	99	27	72	22
OWNERS	81	24	57	18
TV STATIONS	14	2	12	2
RADIO STATIONS	28	6	22	4
DAILY NEWSPAPERS	10	4	6	2
WEEKLY NEWSPAPERS	15	15	0	0
MAGAZINES	32	-	32	14

MARKET 173 MEDFORD, OREGON — HOMES: 45,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	58	16	42	19
OWNERS	48	12	36	17
TV STATIONS	5	2	3	0
RADIO STATIONS	10	9	1	1
DAILY NEWSPAPERS	6	2	4	2
WEEKLY NEWSPAPERS	3	3	0	0
MAGAZINES	34	-	34	16

MARKET 174 EUREKA, CALIFORNIA — HOMES: 45,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	77	19	58	24
OWNERS	66	18	48	22
TV STATIONS	8	2	6	0
RADIO STATIONS	17	5	12	7
DAILY NEWSPAPERS	6	1	5	1
WEEKLY NEWSPAPERS	11	11	0	0
MAGAZINES	35	-	35	16

MARKET 175 GREENWOOD, MISSISSIPPI HOMES: 45,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	74	16	58	18
OWNERS	58	15	43	17
TV STATIONS	11	1	10	4
RADIO STATIONS	22	8	14	7
DAILY NEWSPAPERS	7	2	5	1
WEEKLY NEWSPAPERS	5	5	0	0
MAGAZINES	29	-	29	6

MARKET 176 CASPER-RIVERTON, WYOMING HOMES: 45,200

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	103	28	75	36
OWNERS	82	25	57	27
TV STATIONS	13	2	11	1
RADIO STATIONS	25	14	11	1
DAILY NEWSPAPERS	9	4	5	1
WEEKLY NEWSPAPERS	8	8	0	0
MAGAZINES	48	-	48	33

MARKET 177 TYLER, TEXAS HOMES: 45,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	84	22	62	19
OWNERS	68	19	49	13
TV STATIONS	9	1	8	3
RADIO STATIONS	23	9	14	1
DAILY NEWSPAPERS	8	2	6	1
WEEKLY NEWSPAPERS	10	10	0	0
MAGAZINES	34	-	34	14

MARKET 178 BILOXI, MISSISSIPPI HOMES: 42,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	61	12	49	22
OWNERS	50	11	39	18
TV STATIONS	8	1	7	3
RADIO STATIONS	11	7	4	4
DAILY NEWSPAPERS	6	1	5	1
WEEKLY NEWSPAPERS	3	3	0	0
MAGAZINES	33	-	33	14

MARKET 179 ROSWELL, NEW MEXICO HOMES: 40,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	71	16	55	19
OWNERS	62	14	48	17
TV STATIONS	9	2	7	2
RADIO STATIONS	21	10	11	2
DAILY NEWSPAPERS	7	3	4	2
WEEKLY NEWSPAPERS	1	1	0	0
MAGAZINES	33	-	33	13

MARKET 180 YUMA, ARIZONA HOMES: 40,500

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	79	14	65	26
OWNERS	65	12	53	24
TV STATIONS	17	3	14	2
RADIO STATIONS	16	3	13	8
DAILY NEWSPAPERS	8	3	5	3
WEEKLY NEWSPAPERS	5	5	0	0
MAGAZINES	33	-	33	13

MARKET 181 BUTTE, MONTANA HOMES: 40,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	80	23	57	21
OWNERS	62	22	40	19
TV STATIONS	10	2	8	3
RADIO STATIONS	22	10	12	1
DAILY NEWSPAPERS	8	3	5	0
WEEKLY NEWSPAPERS	8	8	0	0
MAGAZINES	32	-	32	17

MARKET 182 GRAND JUNCTION, COLORADO HOMES: 38,600

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	89	33	56	25
OWNERS	75	29	46	21
TV STATIONS	11	3	8	1
RADIO STATIONS	22	10	12	3
DAILY NEWSPAPERS	5	3	2	2
WEEKLY NEWSPAPERS	17	17	0	0
MAGAZINES	34	-	34	19

MARKET 183 TWIN FALLS, IDAHO — HOMES: 34,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	69	19	50	21
OWNERS	60	19	41	18
TV STATIONS	8	1	7	2
RADIO STATIONS	15	7	8	2
DAILY NEWSPAPERS	5	2	3	1
WEEKLY NEWSPAPERS	9	9	0	0
MAGAZINES	32	-	32	16

MARKET 184 LIMA, OHIO — HOMES: 34,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	63	8	55	25
OWNERS	53	7	46	22
TV STATIONS	10	1	9	4
RADIO STATIONS	8	3	5	5
DAILY NEWSPAPERS	9	2	7	0
WEEKLY NEWSPAPERS	2	2	0	0
MAGAZINES	34	-	34	16

MARKET 185 FORT MYERS, FLORIDA — HOMES: 31,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	57	9	48	17
OWNERS	48	8	40	14
TV STATIONS	10	2	8	1
RADIO STATIONS	5	3	2	2
DAILY NEWSPAPERS	4	1	3	1
WEEKLY NEWSPAPERS	3	3	0	0
MAGAZINES	35	-	35	13

MARKET 186 SALISBURY, MARYLAND — HOMES: 30,900

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	66	13	53	23
OWNERS	51	12	39	17
TV STATIONS	7	1	6	4
RADIO STATIONS	13	6	7	1
DAILY NEWSPAPERS	8	1	7	1
WEEKLY NEWSPAPERS	5	5	0	0
MAGAZINES	33	-	33	17

MARKET 187 HARRISONBURG, VIRGINIA HOMES: 29,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	77	12	65	21
OWNERS	56	11	45	19
TV STATIONS	15	1	14	5
RADIO STATIONS	18	5	13	1
DAILY NEWSPAPERS	8	1	7	0
WEEKLY NEWSPAPERS	5	5	0	0
MAGAZINES	31	-	31	15

MARKET 188 PRESQUE ISLE, MAINE HOMES: 26,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	42	4	38	19
OWNERS	36	3	33	17
TV STATIONS	4	1	3	1
RADIO STATIONS	4	2	2	2
DAILY NEWSPAPERS	3	0	3	1
WEEKLY NEWSPAPERS	1	1	0	0
MAGAZINES	30	-	30	15

MARKET 189 SAN ANGELO, TEXAS HOMES: 26,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	58	12	46	14
OWNERS	49	11	38	13
TV STATIONS	6	2	4	1
RADIO STATIONS	13	5	8	1
DAILY NEWSPAPERS	3	1	2	0
WEEKLY NEWSPAPERS	4	4	0	0
MAGAZINES	32	-	32	12

MARKET 190 BELLINGHAM, WASHINGTON HOMES: 24,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	55	13	42	23
OWNERS	46	13	33	18
TV STATIONS	5	1	4	3
RADIO STATIONS	10	8	2	1
DAILY NEWSPAPERS	3	1	2	1
WEEKLY NEWSPAPERS	3	3	0	0
MAGAZINES	34	-	34	18

MARKET 191 PANAMA CITY,FLORIDA HOMES: 24,300

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	63	17	46	20
OWNERS	57	16	41	18
TV STATIONS	5	1	4	1
RADIO STATIONS	18	10	8	6
DAILY NEWSPAPERS	8	4	4	0
WEEKLY NEWSPAPERS	2	2	0	0
MAGAZINES	30	-	30	13

MARKET 192 ZANESVILLE,OHIO HOMES: 23,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	49	4	45	24
OWNERS	39	2	37	19
TV STATIONS	6	1	5	3
RADIO STATIONS	6	1	5	5
DAILY NEWSPAPERS	5	1	4	1
WEEKLY NEWSPAPERS	1	1	0	0
MAGAZINES	31	-	31	15

MARKET 193 MISSOULA,MONTANA HOMES: 23,400

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	52	11	41	25
OWNERS	45	9	36	23
TV STATIONS	6	2	4	4
RADIO STATIONS	5	2	3	2
DAILY NEWSPAPERS	5	3	2	0
WEEKLY NEWSPAPERS	4	4	0	0
MAGAZINES	32	-	32	19

MARKET 194 HAYS,KANSAS HOMES: 23,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	83	24	60	33
OWNERS	71	21	50	30
TV STATIONS	8	2	6	2
RADIO STATIONS	19	3	16	7
DAILY NEWSPAPERS	9	2	7	4
WEEKLY NEWSPAPERS	16	16	0	0
MAGAZINES	31	-	31	20

MARKET 195 LUFKIN,TEXAS HOMES: 22,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	70	13	57	24
OWNERS	60	13	47	21
TV STATIONS	11	2	9	3
RADIO STATIONS	16	4	12	3
DAILY NEWSPAPERS	7	2	5	2
WEEKLY NEWSPAPERS	5	5	0	0
MAGAZINES	31	-	31	16

MARKET 196 LAREDO,TEXAS HOMES: 20,50(

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	54	6	48	19
OWNERS	46	6	40	16
TV STATIONS	10	2	8	3
RADIO STATIONS	14	2	12	6
DAILY NEWSPAPERS	3	1	2	1
WEEKLY NEWSPAPERS	1	1	0	0
MAGAZINES	26	-	26	9

MARKET 197 KLAMATH FALLS,OREGON HOMES: 19,00(

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	52	7	45	21
OWNERS	44	7	37	18
TV STATIONS	8	1	7	2
RADIO STATIONS	9	4	5	1
DAILY NEWSPAPERS	4	1	3	2
WEEKLY NEWSPAPERS	1	1	0	0
MAGAZINES	30	-	30	16

MARKET 198 TUPELO,MISSISSIPPI HOMES: 18,60(

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	51	7	44	23
OWNERS	40	7	33	19
TV STATIONS	5	1	4	4
RADIO STATIONS	11	3	8	5
DAILY NEWSPAPERS	5	1	4	2
WEEKLY NEWSPAPERS	2	2	0	0
MAGAZINES	28	-	28	12

MARKET 199 NORTH PLATTE,NEBRASKA HOMES: 13,800

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	49	13	36	19
OWNERS	44	12	32	17
TV STATIONS	4	1	3	2
RADIO STATIONS	9	4	5	1
DAILY NEWSPAPERS	3	1	2	1
WEEKLY NEWSPAPERS	7	7	0	0
MAGAZINES	26	-	26	15

MARKET 200 PEMBINA,NORTH DAKOTA HOMES: 12,100

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	67	22	45	28
OWNERS	58	22	36	22
TV STATIONS	5	2	3	2
RADIO STATIONS	17	2	15	9
DAILY NEWSPAPERS	4	0	4	2
WEEKLY NEWSPAPERS	18	18	0	0
MAGAZINES	23	-	23	15

MARKET 201 ENSIGN,KANSAS HOMES: 12,000

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	66	13	53	29
OWNERS	55	11	44	26
TV STATIONS	7	1	6	2
RADIO STATIONS	19	2	17	5
DAILY NEWSPAPERS	4	1	3	3
WEEKLY NEWSPAPERS	9	9	0	0
MAGAZINES	27	-	27	19

MARKET 202 HELENA,MONTANA HOMES: 10,00

	TOTAL NO. IN MKT.	NUMBER ORIGINATING IN MKT.	NUMBER ENTERING MKT. TOTAL	+5% OF MKT.
MEDIA	50	6	44	28
OWNERS	41	5	36	24
TV STATIONS	9	1	8	5
RADIO STATIONS	9	2	7	3
DAILY NEWSPAPERS	3	1	2	2
WEEKLY NEWSPAPERS	2	2	0	0
MAGAZINES	27	-	27	18

MARKET 203 JACKSON,TENNESSEE	TOTAL NO. IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.	HOMES: 5,3-(
MEDIA OWNERS	50	47	34	
	38	35	27	
TV STATIONS	7	6	3	
RADIO STATIONS	15	14	13	
DAILY NEWSPAPERS	5	4	4	
WEEKLY NEWSPAPERS	0	0	0	
MAGAZINES	23	23	18	

MARKET 204 GLENDIVE,MONTANA	TOTAL NO. IN MKT.	NUMBER ENTERING MKT. TOTAL	NUMBER ENTERING MKT. +5% OF MKT.	HOMES: 4,600
MEDIA OWNERS	36	31	27	
	30	26	22	
TV STATIONS	5	4	4	
RADIO STATIONS	8	6	5	
DAILY NEWSPAPERS	2	2	2	
WEEKLY NEWSPAPERS	2	0	0	
MAGAZINES	19	19	16	

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[Anderson, "Broadcast Stations and Newspapers: The Problem of Information Control: A Content Analysis of Local News Presentations" (1971) (NAB Exhibit E), pp. 1-46]

TABLE OF CONTENTS

INTRODUCTION 1
METHODOLOGY 8
RESULTS AND DISCUSSION. 18
SUMMARY AND CONCLUSIONS 44
APPENDIX A 47
APPENDIX B 50
APPENDIX C 52
APPENDIX D 54
BIBLOGRAPHY 79

It has been suggested that patterns of multi-media ownership result in both anti-competitive practices and the potential for repressive information control. The former area has been dealt with elsewhere (see Anderson, Coe and Saunders;(1969). It is to the latter – the problem of information control – that this study is addressed.

Perhaps the most serious concern of the information control critics is the pattern of ownership where broadcast outlets are owned in common with the market newspaper. There are approximately 150 markets in the United States where broadcast outlets are owned in that area. The combinations range from newspaper partnership with a small FM radio station to the common ownership of all four media – newspaper, television, AM and FM radio – in the market. Questions concern-

ing the results of singular control of these sources are more than legitimate. Clearly, if one can postulate and defend that a) public information sources for a market are primarily limited to those the market can support; b) the effect on public opinion is proportional to the number of information sources owned; c) forces in the information market place do not prevent the manipulation of information for self-serving purposes, then such questions are vital to the free-market-place-of-ideas foundation of our democracy. The postulates, while perhaps facilely stated, are not easily supported. With the influx of regional newspapers; regional editions of national magazines; the increased availability of broadcast signals; the increased opportunities for travel and education; the continued evidence of active networks of interpersonal communication, information sources do not appear to be limited to those mass media outlets indigenous to a market. Documentation of the ability of a single, even if monolithic, source to dominate public opinion has been notably absent from the scientific literature in the field. Finding the opposite results has been the ordinary case. Finally the previously cited study by Anderson *et al.* indicated that forces in the market place adequately controlled the appearance of anti-competitive practices as a systematic result of patterns of ownership. Could such prevention also be true of information control?

One way to determine an answer is a careful and objective examination of the informational content of both cross-media-owned broadcast outlets and separately owned broadcast outlets. If practices of information control were occurring one would expect to see different ownership conditions. Specifically one would expect a) television outlets commonly owned with a newspaper to evidence greater correspondence on subject matter and

its treatment with that newspaper than separately owned television stations; b) radio outlets commonly owned with a newspaper to show greater agreement in subject matter and its treatment with that newspaper than separately owned radio outlets; c) with the same market, patterns of treatment of the same stories presented by both broadcast station groups to be different; and d) within the same market, the news service rendered by the two ownership groups to be different.

It is the purpose of this study to provide the careful and systematic observation called for, in order to test the above expectations for validity. Systematic and objective observation requires a methodology known as content analysis. This process embraces a large number of activities, ranging from counting the relative frequency of each word in a text to evaluating the relative attitude intensity held by different authors. It has been used to develop dictionaries of common words; identify the textual writers of the old and new testaments; authenticate the dead sea scrolls; and evaluate trends in newspaper comics. As a process it concerns the establishment of clearly defined rules of analysis consistently applied to some content for the purpose of solving some problem. As a procedure content analysis is limited by the a) adequacy of the rules of analysis in measuring the attributes intended; b) the sufficiency of the rules to cover all occurences of the attributes to be measured; c) the consistency of their application; d) the clarity of the relationship between the data gathered and the problem to be solved. In other terms these are the time honored requirements of validity, reliability, and logic. Quite obviously content analysis cannot be generally evaluated. Rules which may be adequate for one problem can be irrelevant to another. Consequently content analytical

techniques must be evaluated in the specific terms of the problem to be solved. The result of this content/problem specificity has been the development of a multiformity of techniques. These include a) sampling methods; to determine the content to be evaluated; b) schemes of categories to identify subject matter; c) attitude measures; d) measures of meaning; e) measure of argumentative position; f) measures of textual characteristics (e.g. adjective/verb ratio); g) measures indicative of the personality characteristics of the author; h) measures of the length, position, and other demographic values of the item analyzed. Along with these measures, ancillary methods determining the reliability, validity, and/or interrelationships of the above measures have been developed. There are several overviews of these measures and methods. Two of particular note are Holsti (1969) and Pool (1959).

There have been a large number of studies dealing with radio and television content including more than 100 relating directly to news content. Bibliographies listing these studies include Holsti (1969), Budd *et al.* (1967), Barcus (1960), and Barnes (1959). Of these numbers there are surprisingly few which deal with the problem at hand. In fact a reasonable search of the literature provides no studies which offer story by story analysis of the news output of radio and television stations operating under different ownership patterns. Perhaps the closest is Baldridge's (1967) study which gives a comparison of programming in general by group and non-group owned television stations.

Not only is the lack of studies precisely pertinent to this realm a problem, but the studies investigating news which are available have used methods inappropriate to our problem. Traditionally such studies have analyzed news content by establishing a limited set of categories

and rules of sorting. Each story then is sorted by the established rules into one of the categories. Comparisons are made by matching the relative frequency generated by another. For example, Thorton's (1970) study of violence, protest, and war in television news, used those three categories to code stories from Canadian and American sources. He found the CBC averaging 29.4 per cent of their total news in these violence categories and CBS 51.3 per cent, for the period of April 20 to May 10, 1970. Obviously this method gives us a startling insight into the difference between Canadian and American television news. But also quite obviously it cannot answer (nor was it intended to) questions about whether the same topics were presented or whether the treatment by each was the same.

A similar example can be drawn from Nixon and Jones (1956) who analyze the content of competitive and non-competitive newspapers. When they report that such newspapers present almost the same percentage of government news they tell us little or nothing about the way these newspapers might be shaping the opinion about the government in their readers. Competitive newspapers might be forced by market pressures to present the more sensational stories; whereas non-competitive newspapers may be able to provide a more balanced view. Of course, the reverse may be true; we simply do not know.

Since in this study we are particularly interested in whether different courses present the same news story and in the same way, these traditional methods are inadequate for the solution for our problem. Consequently a new methodology was developed. By rephrasing our expectations concerning information control into questions, we can determine the comparisons and measures which must be made by this new methodology.

The first question then is stated as: Will television outlets commonly owned with a newspaper evidence greater correspondence with that newspaper on subject matter and its treatment than separately owned stations? This question specifies that each story from a television station owned in common with a newspaper be compared with each story from its allied newspaper to ascertain whether the stories are the same and if so whether the attitudes expressed (treatments) are similar. The same comparison must be made between a separately owned television station and the same newspaper.

Will radio outlets owned with a newspaper show greater agreement in subject matter and its treatment with that newspaper than separately owned radio outlets? The second question, therefore, requires a comparison of each radio outlet selected in the market to be compared with each story similarly presented by the broadcast-media-allied newspaper in that market. Common sense requires the stations to all be in the same market and the stories from the same day. We shall follow these common sense rules throughout.

Content comparisons are always difficult. Cross-media comparisons increase the difficulty according to the number of characteristics unique to each medium. Difficulties plainly exist even in the comparison of radio and television content. E.g. there are not indications that a picture can ever be the same as a set of spoken words (see Anderson, 1965, 1966, 1968a, 1968b, 1969). But generally in news broadcasts the primary mode of presentation is the same – the spoken word. Consequently, the content is presented sequentially, one bit of information at a time, with complete control over the order of reception but almost no reference ability on the part of the receiver. The printed word of the newspaper has only the first of

these characteristics. It does present material sequentially, but presents it all at once and hence has no control over the order in which stories are read but does provide perfect referability for the receiver. Additionally broadcast presentations are severely limited by the practices of their media in the amount of material they can present. Newspapers, while still limited, (newsprint is expensive) usually present several times the material. For our purposes these differences mean we will have to impose some rules concerning the selection of stories and some artificial order to make the comparisons meaningful. These rules are described below under the title "Methodology".

The third question asks: Within the same market and for stories ascertained to be about the same topic, will the pattern of treatment shown by newspaper-combined stations be different from the pattern shown by non-newspaper-combined stations? This question stipulates first, the identification of stories which are about the same subject and are presented by both the newspaper-combined outlet and the non-newspaper-combined outlet. It then requires judgments to be made concerning the attitudes expressed by each writer toward the common subject matter.

The fourth question is formulated as: Within the same markets, will the news service provided by newspaper-allied stations be different from the service provided by non-newspaper-allied stations? The requirements of this question are first, measures of the service provided and second, a comparison of the scores of the two broadcast group over these measures. The technical procedures used to fulfill the requirements for answers to these questions follow immediately.

METHODOLOGY

The first requirement of the methodology was to provide a system to compare each story from one source with each story from all the other sources. The physical logistics of handling up to seven separate sources, each with a score or more stories, precluded direct comparison. As a result, a process called key word comparison was developed. Simply stated it required an individual to read a story and determine the key words which described the major topic areas in the story. Key words were defined as persons, things, organizations, concepts, ideologies, political entities, actions, and so on which produce some effect or are the object of some activity, statement, discussions, or description that occupies a significant portion of the content of a news story. The last phrase of the definition "occupies a significant portion of the content of a news story" was left undefined. Definition of the word significance was a judgmental act. Since judgments can sometimes be unique to the individual, a team of four raters was used to select the key words from each story. Only those key words identified by two of the four raters were used in subsequent analyses.

The second requirement of the methodology was to provide measures of treatment. Two scores were devised for this purpose. They were the key word rating score and the story rating score. In the key word rating score, judges were instructed to evaluate the attitudes expressed in the news story by the writer toward the key word. Key word rating scores were numerical values from 1-7 which indicated the direction and intensity of the evaluative treatment of the key word. The primary polar interpretations were positive (1) and negative (7). Other polar interpretations allowable were tasteful – distasteful; clean – dirty; pleasant – unpleasant; beautiful – ugly;

fragrant – foul. The words used to describe the seven intervals were: a) 1 or 7; extremely, perfectly, completely, maximally, remarkable, definitely; b) 2 or 6: quite, considerably, fairly, reasonably, ordinarily, normally; c) 3 or 5; slightly, barely, minimally, a little, a bit, somewhat; d) 4 neutral. Raters were instructed to first select the direction assigned to the key word – positive, negative, or neutral. Direction was to be determined by the adjectives and adverbs used to describe the key word. It could also be determined by the association of the key word with some positive or negative action which the key word undertakes or is responsible for. In determining direction, only meanings common to most users of American English were utilized.

Once direction was established the next step was to determine the location on the intensity scale. Some nouns implied their own intensity measure. "Fair play" seems quite favorable. "Atrocities" is very negative. However, in most cases intensity was determined by the modifiers both adjectives and adverbs. Intensity as with direction was based on the common usage of words.

The story score was developed in precisely the same way as the key word rating score. However, the object of evaluation shifted from the key words to the total story. The purpose of this score was to be sensitive to balance in presentations. With a mixture of key word evaluative treatments, the overall treatment effect of a story might be quite different from the treatment effect of a single key word. The story score provided an indication of this effect.

Demographic information about the story was also recorded. These data included market of presentation, rank of that market, medium of presentation, ownership

of that medium; position of the story, length of the story and source of the story (local, AP wire, etc.).

All markets in which there was a newspaper-television-radio combination that had television and radio competition from non-newspaper and separately owned outlets were used in this study.[1] The newspaper-allied television-radio combination was matched with a randomly selected television-radio combination whose components were not allied with a newspaper and had no corporate connections. The two combinations were composed of equivalent services. That is a TV-AM-FM combination was matched with a TV-AM-FM combination; a TV-AM with a TV-AM and a TV-FM with a TV-FM. When choice was possible the non-newspaper-allied combinations were randomly selected under the following parameters: a) AM stations should be licensed for fulltime operation; b) TV stations where possible should operate on the same band; c) the TV, AM, and FM stations selected had to provide primary service to the same markets as the newspaper combinations. The purpose of the random sample technique was to reduce the available data to manageable size and to provide data free from the biases inherent in any matched sample technique. Entities can differ one from another on an infinite number of variables. A matching procedure uses some limited number of these variables to proclaim any set equivalent. The dangers that the matching procedure will systematically interact with the data collected are substantial. The random selection procedure is the only procedure which *can* be unbiased.

[1]New York and Boston were two exceptions. Both markets were deleted because they were the site of other litigation which have affected the market news coverage.

Scripts from the "prime evening newscast" were solicited from each of the stations for the Monday, Wednesday, and Friday of an arbitrarily selected week. For approximately one-third of the sample, the week of November 16th was used; for the second third, the week of December 7th; for the final third, the week of January 18th. The weeks selected were determined by the schedule allotted to the study and by the requirement that the time selected should be close to but preceding the receipt of the requesting letter. Three scripts were selected to provide an adequate analytical base. All hard news, and human interest items were used as the basis for analysis. Sports, financial summaries, and weather items except where they were also hard news were not included. Each station was requested to mark the end of each story and to identify its source. Appendix A gives a copy of the requesting letter.

Story selection, key word selection, key word ratings, and story ratings were done by a team of four raters. In order to ensure that comparable stations would receive the same analysis, three teams of raters were used; one for each of the broadcast media. The FM team did double duty by also rating the newspapers. Stations were coded by a number whose meaning was known only to the primary research team. However, no other secrecy measures were taken. Each rater worked independently to select those stories which were hard news or human interest items, to select the key words for those stories, and to rate the key words and the stories themselves. Stories selected by any two raters were rated by all. Work sheets from the rating teams were processed by a checker to ensure that each qualifying story was rated and appropriately labeled. The checker also removed any minor discrepancies in the key words among the raters.

These discrepancies were such things as spelling, inclusion of prepositions, punctuation, minor adjectives, and so forth. The data were then key-punched and verified. Additionally, the data cards were checked by computer to ensure that they were in the proper order, that the data were in their proper fields, and that scores were within the scale limits. This "error scan" program was run again with all cards immediately prior to the calculation phase of this study.

The key words, key word ratings, and the story ratings for each story generated by each rating team were then reconciled by computer to provide a single set of data. Appendix B provides a description of the procedures used. Key words retained for a story were those listed by three of the four raters. Key word ratings were the mean scores from the selecting raters. Story ratings were the mean scores from all members of the team.

The questions of interest reported above evoked a series of specific research hypotheses. These were:

1) Newspaper-allied television outlets will evidence greater topic correspondence with the allied newspaper than separately owned television stations will show with the newspaper.
2) Newspaper-allied television outlets will evidence greater story treatment correspondence with the allied newspaper than separately owned television stations will show with that newspaper.
3) Newspaper-allied television outlets will evidence greater key word treatment correspondence with the allied newspaper than separately owned television stations will show with that newspaper.
4) Newspaper-allied radio stations will show greater topic correspondence with the allied newspaper than separately owned radio stations will show with that newspaper.

5) Newspaper-allied radio stations will show greater story treatment correspondence with the allied newspaper than separately owned radio stations will show with that newspaper.
6) Newspaper-allied radio stations will show greater key word correspondence with the allied newspaper than separately owned radio stations will show with that newspaper.
7) Newspaper-allied television and radio combinations will evidence greater topic correspondence than equivalent non-newspaper, separately owned television and radio combinations.
8) Newspaper-allied television and radio combinations will evidence greater story treatment than equivalent non-newspaper, separately owned television and radio combinations.
9) Newspaper-allied television and radio combinations will evidence greater key word treatment correspondence than equivalent non-newspaper, separately owned television and radio combinations.
10) For the same story newspaper-allied television stations will evidence a different pattern of story treatment scores than the pattern evidenced by non-newspaper-allied television stations.
11) For the same key words within the same story newspaper-allied television stations will evidence a different pattern of key word scores than the pattern evidenced by non-newspaper-allied television stations.
12) For the same story newspaper-allied radio stations will evidence a different pattern of story treatment scores than the pattern evidenced by non-newspaper allied radio stations.
13) For the same key words within the same story newspaper-allied radio stations will evidence a different pattern of key word scores than the pattern evidenced by non-newspaper-allied radio stations.

14) Newspaper-allied television stations will show less topic diversity than non-newspaper-allied television stations.

15) Newspaper-allied radio stations will show less topic diversity than non-newspaper-allied radio stations.

16) Newspaper allied television stations will report fewer stories than non-newspaper-allied television stations.

17) Newspaper-allied radio stations will report fewer stories than non-newspaper-allied television stations.

18) Newspaper-allied television stations will use fewer sources than non-newspaper-allied television stations.

19) Newspaper-allied radio stations will use fewer sources than non-newspaper-allied radio stations.

20) Newspaper-allied television stations will present fewer stories written by the local station staff than non-newspaper-allied television stations.

21) Newspaper allied radio stations will present fewer stories written by the local station staff than non-newspaper-allied radio stations.

The first six hypotheses provide the answers for questions one and two. To test these hypotheses three correspondence scores were developed. The first taking each broadcast outlet in turn compared each story from the broadcast outlet with each story from the broadcast-allied newspaper. The comparison was conducted for each news day. Within a given comparison if one or more of the key words agreed, the stories were deemed equivalent or common. The story correspondence score was calculated from the ratio of the number of common stories over the larger number of stories in the pair.

The second score determined the correspondence between the story scores given to the same (common) story by the two outlets. Only stories determined to be common in the text above were used. The story rating correspondence score was the ratio of the number of common story *ratings* over the number of common *stories*. In testing for commonality of rating, the rating scores were truncated to a three value scale with 1 being positive; 2 being neutral; and 3 being negative. The purpose of this truncation was to avoid trivial differences being counted as substantial.

The third score measured the correspondence between the ratings for common key words within the same story that were common to both outlets. Again only stories meeting the first test were used. Key words were said to be common if 90 per cent of the letters in sequence agreed precisely. The key word rating correspondence score for media was calculated as the ratio of the number of common key words with the same rating over the number of common key words. The truncation used with the story ratings was used again with the key words.

These three measures were developed for both the newspaper and non-newspaper-allied broadcast stations. As suggested previously the analysis of newspapers required the formulation of some special rules. The rules, described in Appendix C, controlled the selection of specific pages which were used in the analysis. Essentially the pages were the front page and the "prime local news" page. Stories including those continued on other pages were rated in their entirety. Each of the measures was submitted to a repeated measures analysis of the variance design with each market/newsday being treated as a subject. The rationale for using the market/newsday as a subject is that each newsday provides the source of news items for all news media. Any given news medium is reflecting in its news presentations the way it evaluates the the events of the day. By comparing news media over a given day, one can determine similarities and differences in these evaluations.

In order to avoid the problems of interpretation of the appearance of "no significant differences" or the appearance of trivial but significant differences, correlation analysis was also conducted over these data. For our hypotheses to be completely supported, significant differences should appear in the analysis of variance and there should be no significant positive correlation.

The next three hypotheses (6-9) do not refer to any of the questions. They are included as topics of interest and a logical extension of the methodology used. For these hypotheses the measures and analyses described above were used with each of the broadcast media combinations and each of the ownership groups.

Question three was investigated by hypotheses 10 thru 13. Treatment patterns are complex and difficult to identify. In terms of the measuring instruments used here, differences in these patterns can be of three types. First the evaluations of each story or of each key word by the two stations could be of the same intensity but in the opposite direction. Second the evaluations could be in the same direction but of different intensities. Third the differences could be a combination of intensity and direction. Since each evaluation was tied to specific content, the likelihood of an owernship difference consistent in direction or in intensity or both was exceedingly small. Individual statistical tests require consistency in one of these areas for power. As a result no single statistical procedure was adequate to test for the possibility of systematic ownership effects. The following set of procedures was used over the treatment scores for matching (common) stories and matching key words within common stories.

To determine the internal stability of the story ratings and the key word scores the means and variance were

calculated on two transformations of these measures. The first transformation was the algebraic sum of the sum of the score minus the constant 4. That is (X-4). The second was the absolute sum of the score minus the constant 4. That is /X-4/. If the scores were stable at the neutral point, one would expect the means of both transformations to be 0 and the variance to be small. If, however, the scores tended to switch back and forth in direction but not intensity, then one would expect the mean of the first transformation to be 0, the mean of the second transformation to be something other than 0 and the variances to be relatively large. If the scores varied in the intensity but not direction then one would expect both means to be something other than 0 and the variances to be moderate to large.

To test for significance of any difference the following procedures were used: To test for a consistent difference in direction, the raw scores were correlated. A direction difference would result in a negative correlation. To test for differences in intensity the score from the non-newspaper-allied outlet was subtracted from the score from the newspaper-allied outlet. The algebraic sum of this transformation (X-Y) was used to test whether the obtained mean differed from the predicted mean of zero. To test for the combination the absolute sum of the above transformation was used. That is /X-Y/. Again the obtained difference was tested against the expected difference of zero.

Only a combination of tests such as these would be sensitive to the varying patterns of difference that could occur.

Hypotheses 14-21 provide insight into the answer of question four. For hypothesis 14 each story from the newspaper-allied television outlet was compared with

each story from the non-newspaper-allied television station. Stories were determined to be common or different according to the test described above. A topic diversity score was calculated for each station by taking the ratio of the number of different stories over the total number of stories presented by that station. In the same manner hypothesis 15 was tested except that the radio stations were used. In both instances the data were analyzed by analysis of variance and correlation analysis.

In hypothesis 16 the number of stories presented on each day by each of the newspaper-allied television stations was compared by means of analysis of variance with the number of stories presented by non-newspaper-allied television stations. Hypothesis 17 used the same procedures with the radio stations.

Hypotheses 18 and 19 were tested in the same manner as 16 and 17 using the number of different sources appearing in a newsday as the datum.

Hypotheses 20 and 21 were tested by determining the proportion of stories which were locally written. The score was the number of locally written stories for each newsday over the total number of stories for that newsday. Analysis of variance was conducted over these data.

In all tests the .05 level of significance was used. All data were analyzed using the Ohio University computer facilities. The Ohio University Computer Center operates an IBM Model 360/44 with appropriate options. Data handling programs were developed by the Broadcast Research Center and, as noted, as described in Appendix B.

RESULTS AND DISCUSSION

Table 1 presents the markets in which a newspaper or broadcast station returned data for this study. In all 36 newspapers, 85 television stations, and 92 radio stations from 49 markets responded. A total of 720 scripts and papers were received and analyzed.[1]

The percentage of return to the requesting letter varied widely among the media and ownership groups. For the newspaper-owned stations 96 per cent return was obtained for television; 73 per cent for radio. For the non-newspaper-owned stations, 78 per cent return was obtained for television; 37 per cent for radio. Seventy-four per cent of the newspapers contacted responded.

The major discrepancy in return was with the non-newspaper-owned radio stations. Three reasons substantially accounted for their failure to return. The first was that the station did not retain scripts after broadcast. The second was that the station actively refused to comply with the request. The third, the station did not respond to the letter and three attempts to make contact by telephone failed. Of the reasons, the first applied to about half of the return failures; the remaining two about equally accounted for the other half. Nearly all of the failures to return for the other broadcast categories were accounted for by the lack of scripts. The primary problem in obtaining the newspapers was the necessity of having the physical paper itself. Some newspapers do not retain back copies; others had run out of the particular days requested; and still others, operating under a 30 day rotation, had disposed of the back copies needed.[2]

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[1]The scope of the study is best described in physical terms. Over 7000 stories generating over 21,000 key words were recorded on 52,000 data cards.

[2]The decision to analyze newspapers came several weeks after the initial station selection.

TABLE 1

	Newspaper Owned				Non-Newspaper Owned		
Top 50 Markets	AM	FM	TV	Newspaper	AM	FM	TV
Atlanta, Ga.	x		x	x			
Baltimore, Md.	x	x	x				
Birmingham, Ala.	x	x	x				
Buffalo, N.Y.	x	x	x	x		x	x
Chicago, Ill.	x		x	x			x
Columbus, Ohio	x	x	x	x			x
Dallas, Texas	x	x	x	x		x	x
Dayton, Ohio	x	x	x		x	x	x
Detroit, Mich.	x	x	x	x	x	x	x
Ft. Worth, Texas	x	x	x	x	x		
Greenville, S.C.		x	x		x		x
Houston, Texas	x		x	x			
Lancaster, Pa.	x	x	x	z	x		x
Louisville, Ky.	x	x	x	x	x		x
Memphis, Tenn.	x	x	x	x		x	x
Milwaukee, Wis.	x	x	x	x			x
Minneapolis, Minn.	x	x	x	x			x
Norfolk, Va.			x				x
Oklahoma City, Okla.			x	x			x
Philadelphia, Pa.	x	x	x	x	x		x
Portland, Oregon			x	x	x	x	x
Sacramento, Calif.	x		x				x
Salt Lake City, Utah	x	x	x		x		x
St. Louis, Mo.	x		x	x	x		
Syracuse, N.Y.	x		x	x			
Tampa, Florida	x		x	x			x
Washington, D.C.	x	x	x	x	x	x	x

	Newspaper Owned			Non-Newspaper Owned			
51 and below	AM	FM	TV	Newspaper	AM	FM	TV
Baton Rouge, La.	x		x	x	x		x
Binghampton, N.Y.	x		x	x	x		
Boise, Idaho	x	x	x	x			x
Cedar Rapids, Iowa	x		x	x			x
Columbus, Ga.	x	x	x	x			x
Des Moines, Iowa	x	x	x				x
Duluth, Minn.			x	x	x		x
Fargo, N.D.	x			x	x		x
Ft. Smith, Ark.			x				
Fresno, Calif.	x		x	x	x		x
Jackson, Miss.			x	x			x
Las Vegas, Nev.			x	x			x
Meridian, Miss.			x				
Reno, Nevada							x
Rochester, N.Y.	x		x	x			x
Rock Island, Ill.	x		x	x	x	x	x
South Bend, Ind.	x	x	x	x	x		x
Spokane, Wash.	x		x	x			x
Springfield, Mo.	x		x	x	x		x
Topeka, Kan.	x	x	x		x		
Wausau, Wis.	x	x	x			x	
Youngstown, Ohio	x		x	x	x		x

Table 1 – Markets from which data was obtained

The results from the statistical analysis are presented below in the order of the hypotheses. For the reader's convenience, the analysis of variance summary tables are reported in Appendix C.

Hypothesis 1) Newspaper-allied television outlets will evidence greater topic correspondence with the allied newspaper than separately owned television stations will show with that newspaper.

Each market where there was a newspaper-allied and a non-newspaper-allied television station and the appropriate newspaper was available was used in a repeated measures analysis of variance. As described above each story from the televised local newscast was compared with each story from the selected pages of the newspaper. Only those station/newspaper combinations which matched by market and newsday were used. In the analysis of variance the market/newsday was used as the subject, and the newspaper group correspondence score were used as the repeated measures. In order to be sensitive to difference in market types the markets were divided into those in the top fifty category by size and those fifty-one and below. The classifications given by Seiden (1971) were used in this study. The resulting analysis was a Linquist (1953) Type I design with the correspondence scores as the within measure the market designations as the between measure and the market/newsdays as the subjects. This design was used in all of the correspondence scores.

No significant interaction of main effects was found in this analysis. Table 2 presents the mean scores for each cell and the F-ratios for each of the tests.
As can be seen from Table 2 in terms of absolute numbers the non-newspaper-allied television stations show greater correspondence with the market newspaper. In interpreting the correspondence score the reader should remember that it represents the correspondence between the broadcast stories and a sample of stories in the newspaper. The correspondence score would be higher if all

TABLE 2

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.08	.07	0.03	1.64	0.61
Non-Newspaper	.10	.09	1,77	1.77	1.77

Table 2 – Mean topic correspondence scores and F-ratios for television by newspaper comparisons

the pages were analyzed. The fact that a sample of the newspaper was used does not affect the comparison between the ownership groups. If one group systematically shows a higher correspondence, this correspondence should appear when using a sample. In order to provide additional information as to the similarity of the two sets of correspondence scores, correlation analysis was conducted. The correlation between the correspondence scores from two ownership types was .34 (df=77) and significant.

The consistently greater correspondence between newspaper-allied television stations and that newspaper which this hypothesis predicted did not appear. Within the markets tested newspaper-allied and non-newspaper-allied television stations show similar degrees of correspondence with the market newspaper over topics selected for presentation.

Hypothesis 2) Newspaper-allied television outlets will evidence greater story treatment correspondence with the allied newspaper than separately owned television stations will show with that newspaper.

The story scores representing the evaluated attitudes expressed in the story by the newswriter were compared

within each newspaper/television combination over commonly were treated in the sam e manner. The Type I analysis of variance comparing the newspaper and non-newspaper groups showed no significant effects. Table 3 presents the mean scores for each cell and the F-ratios for each test. Again in absolute terms the non-newspaper television stations show greater correspondence with the newspaper than the newspaper groups. This effect while not significant shows some strength ($p.<20$). The correlation between the two correspondence scores was (df=77) and significant.

TABLE 3

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.45	.38	0.01	2.38	0.81
Non-Newspaper	.54	.46	1,77	1,77	1,77

Table 3 – Mean story correspondence scores and F-ratios for television by newspaper comparisons.

Ownership patterns, then, show no relationship to the degree of agreement between newspapers and television stations allied with those newspapers and not allied with them over the evaluative treatment of stories presented in common. In fact the different ownership patterns show significantly similar degrees of agreement. Consequently no support is found for the second hypothesis.

Hypothesis 3) Newspaper-allied television outlets will evidence greater key word treatment correspondence with the allied newspaper than separately owned television stations will show that newspaper.

The third hypothesis concerns itself with the degree of agreement between television stations and newspapers over individual themes in common. It tests whether connections with a newspaper increases the degree of agreement in the evaluative treatment of common themes The Type I analysis of variance used to test this hypothesis indicated no significant interactions but significant main effects of ownership and market size. Table 4 presents the mean scores and F-ratios for each of these tests.

TABLE 4

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.41	.21	0.36	8.44*	4.80*
Non-Newspaper	.55	.41	1,77	1,77	1,77

*Significant at the .05 level.

Table 4 – Mean key word correspondence scores and F-ratios for television by newspaper comparisons.

Table 4 shows that non-newspaper-allied television stations generate significantly *higher* correspondence with the broadcast allied newspaper than the newspaper-allied television stations. It also shows that the correspondence is higher generally in the top fifty markets than in the markets fifty-one and below. The results from the three hypotheses taken together suggest a greater commonality of source between the non-newspaper television station and the broadcast allied newspaper. This commonality would explain the greater degree of agreement shown with such combinations over topics presented, attitudes expressed toward those topics

and attitudes expressed toward individual themes presented within a story. Support is found for this rationale in later analyses which show a higher proportion of the stories presented by non-newspaper allied television stations being written by outside sources. Since many of these same sources write for newspapers, commonality of topic and treatment would be explained.

Most certainly the results from the tests of the three hypotheses provide no support for the position that alliances between television stations and newspapers will systematically result in a monolithic presentation of information. There is even some indication that newspaper-allied television stations vary from the newspaper in their presentations to a greater extent than non-newspaper-allied stations.

The next set of three hypotheses present an investigation of the degree of correspondence between radio and newspaper combinations. The approach is exactly the same as used for television/newspaper combinations.

Hypothesis 4) Newspaper-allied radio stations will show greater topic correspondence with the allied newspaper than separately owned radio stations will show with that newspaper.

Each market in which there was a newspaper-allied radio station and non-newspaper-allied radio station and an available newspaper was used to test this hypothesis. The topic correspondence score was constructed as above by comparing each story from each radio station with stories printed by the market newspaper on the selected pages. The correspondence scores were used as the within measure, the market categories as the between measure and the market/newsdays as the subjects in a Type I analysis of variance. No significant effects were

found in the comparison of the ownership groups. Table 5 presents the mean scores for each cell and the F-ratios for each test. The reader is once more cautioned in interpreting the correspondence score as restricted to the pages selected.

TABLE 5

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.07	.09	1.70	1.26	0.34
Non-Newspaper	.07	.06	1,51	1,51	1,51

Table 5 – Mean topic correspondence scores and F-ratios for radio by newspaper comparisons.

Table 5 reveals that the two types of radio stations show exactly the same correspondence mean score in the top fifty market category. Newspaper-allied stations show slightly higher correspondence in the fifty-one and below category. The correlation coefficient between the two sets of correspondence score was .40 and significant.

These results largely repeat the results found with the television/newspaper combinations. The likelihood then is that newspaper and non-newspaper-allied radio stations show similar degrees of agreement with the broadcast allied newspaper.

Hypothesis 5) Newspaper-allied radio stations will show greater story treatment correspondence with the allied newspaper than separately owned radio stations will show with that newspaper.

The degree of agreement between radio news stories and newspaper stories was not different over ownership groups and/or market categories. In the Type I analysis

of variance no significant effects were found. Table 6 gives the mean scores and F-ratios for each test. The means evidence a slightly higher correspondence for non-newspaper-allied stations again repeating the television results. The correlation coefficient was .14 (df=51) and not significant. These results signify that differences from market to market account for any differences in scores.

TABLE 6

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.33	.40	0.01	0.22	0.55
Non-Newspaper	.38	.44	1,51	1,51	1,51

Table 6 – Mean story correspondence scores and F-ratios for radio by newspaper comparisons.

Hypothesis 6) Newspaper-allied radio stations will show greater key word correspondence with the allied newspaper than separately owned radio stations will show with that newspaper.

The final correspondence analysis in this set once more showed no significant effects for the two ownership groups and the two market categories and no significant correlation (.08; df=51) between the two sets of scores. Table 7 discloses the mean scores and the F-ratios from the Type I analysis of variance. In the top fifty category non-newspaper radio stations show higher correspondence with the broadcast allied newspaper. This results is reversed in the fifty-one and below category. Overall the non-newspaper stations score higher which repeats the result found in the television analysis.

TABLE 7

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.29	.35	2.14	0.22	0.41
Non-Newspaper	.42	.25	1,51	1,51	1,51

Table 7 – Mean key word correspondence scores and F-ratios for radio by newspaper comparisons.

The consistent failure to find support for the radio/newspaper correspondence hypotheses and the consistent repetition of the television findings lead us to the conclusion that radio news broadcasts are not systematically influenced in terms of topics presented and attitudes expressed by different ownership patterns. The potential for information control inherent in cross-media alliances appears to be adequately controlled by forces in the market-place.

The next set of hypotheses tested the correspondence between commonly owned television and radio stations and separately owned television and radio stations. These tests, while not centrally related to the issue of cross-media ownership, are a natural extension of the methodology employed in this study. In addition they provide an examination of the methodology under conditions where one group - the commonly owned group – is known to show greater correspondence than the other. We would expect, then, that the commonly owned group would show higher correspondence generally. The extent of this correspondence is unknown although some have predicted it to be quite high. The procedure used to test these hypotheses is the same procedure used in the newspaper comparisons above.

Hypothesis 7) Newspaper-allied television and radio combination will evidence greater topic correspondence than equivalent non-newspaper, separately owned television and radio combinations.

The type I analysis of variance conducted over the topic correspondence scores produced a significant interaction (F=6.86; df=1, 51). Consequently, the Type I design was broken into its simple components. Treatment by subject analyses were run over the correspondence scores from the two ownership groups within each market category and simple random analyses were calculated over the two market categories for each ownership type. Table 8 exhibits the mean score for each market ownership/combination and the F-ratios from each of the component designs.

As predicted the commonly owned stations do show greater correspondence than the separately owned stations. In the top fifty markets this correspondence is still

TABLE 8

Ownership	Market Size		F-Ratios and Degrees of Freedom
	1-50	51+	
Newspaper	.22	.44	12.96*; 1.51
Non-Newspaper	.11	.14	1.36; 1,51
F-ratio	15.06*	12.58*	
and df	1,34	1,17	

*Significant at the .05 level.

Table 8 – Mean topic correspondence scores and F-ratios from component tests for radio by television comparisons.

quite low. Almost 80 per cent of the local stories did not correspond in topic. In the fifty-one and below category the correspondence jumps dramatically, perhaps reflecting the need for more efficient use of new facilities in the smaller markets. This higher correspondence calls for additional research in the form of a case-by-case investigation to determine the source(s) and effects.

Hypothesis 8) Newspaper-allied television and radio combinations will evidence greater story treatment correspondence than equivalent non-newspaper owned television and radio combinations.

The story scores were subjected to the now familiar analytical scheme. The interaction among ownership groups, market categories, and correspondence scores was significant (F=6.39; df=1.51). The Type I design was therefore broken into its components. Table 9 displays the mean scores for each cell and the F-ratios for the

TABLE 9

Ownership	Market Size		F-Ratios and Degrees of Freedom
	1-50	51+	
Newspaper	.72	.70	0.01; 1,51
Non-Newspaper	.66	.29	13.17*; 1,51
F-Ratios	0.51	16.16*	
and df	1,34	1,17	

*Significant at the .05 level.

Table 9 – Mean story correspondence scores and F-ratios from component tests for radio by television comparisons.

subsequent tests. The table shows that the source of the interaction was very low correspondence between separately owned television and radio stations in the fifty-one and below market category.

This correspondence was significantly lower than the correspondence found for the same ownership group in the top fifty markets and significantly lower than the correspondence found for the commonly owned stations in fifty-one and below category.

The other effects were not significant. On the basis of the analyses conducted for this study, this researcher is at a loss to explain the very low correspondence found. Examination of the raw data gives some indication that separately owned broadcast stations in smaller markets express attitudes of some variance rather than clustering quite closely to the neutral position. Specific tests need to be conducted to verify that indication however.

Hypothesis 9) Newspaper-allied television and radio combinations will evidence greater key word treatment correspondence than equivalent non-newspaper separately owned television and radio combinations.

The last correspondence analysis tested the degree of agreement in attitudes about common themes presented by each ownership combinations. The interaction in the Type I design was again significant (F=5; df=1,51) and the subsequent tests were run. The mean scores for each cell and the results for the component tests are presented in Table 10. The key word results replicate the results found with the story scores. Table 10 reveals that only the mean score for the separately owned combinations in the fifty-one and below market categories produced significant differences. It was significantly lower than the comparable scores across ownership and very close to

significance across market size. Again this interesting result. It occurs to this researcher that the small market, independently-owned station may be an exceedingly fruitful unit of analysis in subsequent research.

TABLE 10

Ownership	Market Size		F-Ratios and Degrees of Freedom
	1-50	51+	
Newspaper	.69	.77	0.78; 1,51
Non-Newspaper	.67	.45	3.91; 1,51
F-Ratios and df	0.05 1,34	8.46* 1,17	

*Significant at the .05 level.

Table 10 – Mean key word correspondence scores and F-ratios from component tests for radio by television comparisons.

The results from this set of hypotheses indicate strong evidence for the retention of the first and some evidence for the retention of the remaining two. Certainly retention of all three is called for in the smaller markets. At the same time in calling for the retention of these hypotheses we also call for research into the specific effects that the correspondence identified here has on the information market.

The next set of hypotheses dealt with the possibility of different patterns of evaluative treatment by broadcast stations operating under different ownership. The results from these tests follow in order:

Hypothesis 10) For the same story newspaper-allied television stations will evidence a different pattern

of story treatment scores than the pattern evidenced by non-newspaper-allied television stations.

Table 11 presents the mean scores and standards deviations for the raw story scores (X) the algebraic difference of the score from the neutral point (X-4) and the absolute difference from the neutral point (/X-4/) for stories from newspaper-allied and non-newspaper-allied television stations.

TABLE 11

	Newspaper			Non-Newspaper		
	(X)	(X-4)	X-4	(X)	(X-4)	X-4
Means	4.013	.013	.279	4.076	.076	.302
Standard Dev.	.421	.421	.316	.444	.444	.333
t-tests (df=190)	—	.427	12.237*	—	2.372*	12.567*

*Significant at the .05 level.

Table 11 – Means and standard deviations and t-tests for television story scores by ownership.

The t-tests reported in Table 11 indicated that all means except the algebraic transformation for the newspaper group were significantly different from zero. In reference to the logical analysis presented under "Methodology" above, these results indicate that the story scores for both ownership groups do vary slightly but significantly from the neutral point and for the non-newspaper group the story scores do so more toward the negative side.[2]

The next step in the test of this hypothesis was the calculation of the correlation between the newspaper-

[2]The reader is reminded that the attitude scale ran from 1 (positive) to 7 (negative). Values larger than 4 indicate negative attitudes.

allied station's raw score with its non-newspaper/ counterpart. The coefficient was .39 (df=190) which is moderate strength and significance. Based on our arguments above we infer some consistency of direction.

Finally we are required to test the mean algebraic difference /X-Y/ between the newspaper score and the non-newspaper score. These means were -.063 and .323 respectively. The *t*-tests showed the mean of (X-Y) not to be significantly different from zero (t=1.82; df=190) but the mean of /X-Y/ to be significantly different from zero (t=12.42; df=190). Consequently we infer that newspaper-owned presentations and non-newspaper-owned presentations vary in the same direction (see correlation above) but differ significantly in intensity. A review of all the data, then, indicates that non-newspaper stations are slightly more negative and slightly more intense in the attitudes expressed in common stories.

Hypothesis 11) For the same story newspaper-owned radio stations will evidence a different pattern of story treatment scores than the pattern evidenced by non-newspaper-owned radio stations.

The analysis of the radio story scores followed the same pattern as the analysis of the television story scores. Table 12 presents the means, standard deviations, and for the raw scores and transformed scores from newspaper and non-newspaper-owned radio news broadcasts. All *t*-tests showed the means deviating significantly from zero. These tests indicated that the scores tended to switch back and forth around the zero point but, on the whole were slightly more negative than positive.

As required the correlation coefficient was calculated. The obtained coefficient was .44 (df=321) which is significant. The direction of the two scores tended to be fairly similar.

Finally the *t*-tests were conducted on the mean algebraic (.016) and mean absolute difference (.288) between the ownership groups. The first test (t=.66; df=321) was not significant. The second (t=16.231; df=321) was. These two results show that the newspaper-owned radio stories follow the direction of the non-newspaper-owned stories but differ significantly in intensity. Again non-newspaper-allied radio stories tend to express slightly more intense attitudes.

TABLE 12

	Newspaper			Non-Newspaper		
	(X)	(X-4)	X-4	(X)	(X-4)	X-4
Means	4.093	.093	.266	4.077	.077	.286
Standard Dev.	.390	.390	.300	.432	.432	.333
t-test (df=321)	—	4.285*	15.937*	—	3.204*	15.442*

*Significant at the .05 level.

Table 12 – Means, standard deviations, and *t*-tests for story scores from newspaper and non-newspaper-owned radio stations

Hypothesis 12) For the same key words within the same story newspaper-allied television stations will evidence a different pattern of key word scores than the pattern evidenced by non-newspaper-allied television stations.

Analysis of the patterns in key word evaluation followed the same form as the analysis of the story scores. Table 13 presents the means, standard deviations, and *t*-tests for the raw television key word scores and the two formations.

The television key word scores evidence much the same pattern as the television story scores. All means except the algebraic transformation for the newspaper group were significant. Both station groups tend to deviate from the neutral point, and with the non-newspaper groups being more toward the negative than the positive.

The correlation coefficient was calculated over the two sets of raw scores and was .52 (df= 291). This value is significant and substantiates a consistent relation in direction between the two groups.

TABLE 13

	Newspaper			Non-Newspaper		
	(X)	(X-4)	/X-4/	(X)	(X-4)	/X-4/
Means	4.024	.024	.232	4.100	.100	.253
Standard Dev.	.440	.440	.374	.457	.457	.394
t-tests (df=291)	—	.933	10.622*	—	3.746*	10.995*

*Significant at the .05 level.

Table 13 – Means, standard deviations, and *t*-tests for television key word scores.

The mean algebraic difference (0.076) and the mean absolute difference (.265) between the raw scores from the two groups were tested for deviation from zero. Both means were significantly greater than zero (t=2.950; df=291 and t=12.571; df=291 respectively). The results in the first case again indicate that the non-newspaper group was slightly but consistently more negative in their evaluations of the same key words than the newspaper group. The second case demonstrates that the variation was more extreme in both direction and intensity.

Hypothesis 13) For the same key words within the same story newspaper-allied radio stations will evidence a different pattern of key word scores than the pattern evidenced by non-newspaper-allied radio stations.

The final analyses in this set repeated the approach of the television key word scores. Table 14 presents the means, standard deviations, and *t*-tests for the raw radio key word scores and the two transformations.

The pattern evidenced here was precisely the pattern shown in the radio story scores. All means were significantly different from zero. The pattern again is for the scores to fluctuate around the neutral point but with more of them being negative. The significant correlation coefficient of .52 (df=418) indicates agreement in direction between the two groups.

TABLE 14

	Newspaper			Non-Newspaper		
	(X)	(X-4)	/X-4/	(X)	(X-4)	/X-4/
Means	4.127	.127	.260	4.123	.123	.261
Standard Dev.	.427	.427	.363	.447	.447	.383
t-tests (df=418)	—	6.312*	15.195*	—	5.837*	14.459*

*Significant at the .05 level.

Table 14 – Means, standard deviations, and *t*-tests for radio key word scores.

Finally the mean algebraic difference (.004) and mean absolute difference (.259) were tested. The deviation from zero of the first was not significant (t=.197; df=448). The second was (t=16.027; df=448). Once more newspaper-

owned stations follow closely the direction of non-newspaper evaluations but are separated in intensity with the non-newspaper stations expressing more intense attitudes.

Overall the pattern of evaluations was consistent regardless of the medium or score. Stories and key words from both station groups tend to deviate around the neutral point but more of the deviations were toward the negative side. Considering the subject matter of most news stories this result is verified in common sense. Differences did occur between the ownership groups primarily in intensity but also in direction for television. Inspection of the mean scores showed these differences to be quite small.

The next set of hypotheses tested the topic diversity presented by television and radio stations by the two groups. In both cases markets having matching stations are used in repeated measures designs. Correlation analysis was also conducted.

Hypothesis 14) Newspaper-allied television stations will show less topic diversity than non-newspaper-allied television stations.

The topic diversity score, calculated for each station for each newsday by taking the ratio of the number of different stories over the total number of stories presented by that station, provided a measure of the scope of news presentations in terms of the number of different topic treated. For this hypothesis, a Type I analysis of variance was run over those scores from each market where there was a matched newspaper-allied and non-newspaper-allied television station. The scores served as the within variable, the market categories as the between and the market/newsdays as the subjects in the design.

No significant effects were found in this analysis. Table 15 displays the diversity score means for each cell and the F-ratios for the tests conducted.

TABLE 15

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.74	.65	0.230	3.122	2.603
Non-Newspaper	.78	.72	1,59	1,59	1,59

Table 15 — Mean diversity scores and F-ratios for comparisons of matched television stations.

Examination of the table indicates that newspaper-allied television stations score slightly below non-newspaper-allied stations in diversity. The effect appears to be accounted for by later analyses which show that newspaper stations present slightly fewer stories; a result inturn accounted for by the fact that their stories are on the average longer than non-newspaper station stories.

The two sets of diversity scores were correlated and a significant coefficient of .39 (df=59) was obtained. The result of these analyses appears to be that the two sets of stations approximate one another in the scope of coverage fairly well.

Hypothesis 15) Newspaper-allied radio stations will show less topic diversity than non-newspaper-allied radio stations.

The television analytical scheme was used for the diversity scores. No significant effects were found between the two ownership groups and/or the two market categories. Table 16, which presents the means for each

cell and the F-ratios, indicates that the two ownership group means are virtually the same. The correlation between the two sets of scores resulted in a significant coefficient of .51 (df=122). The relationship between radio stations appears to be even closer than the relationship found for television stations.

TABLE 16

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.80	.76	0.208	0.173	2.578
Non-Newspaper	.80	.77	1,122	1,122	1,122

Table 16 — Mean diversity scores and F-ratios for comparisons of matched radio stations.

Consequently we can offer no support for the position that non-newspaper-allied broadcast stations provide a wider scope of news coverage for their markets.

Hypothesis 16) Newspaper-allied television stations will report fewer stories than non-newspaper-allied television stations.

All markets in which there were matched television stations were used in a Type I design to test this hypothesis. As is now familiar, the design had ownership groups as the within variable, market categories as the between and market/newsdays as the subjects. No significant effects were found. Table 17 gives the mean number of stories for each market ownership category and the F-ratios for the tests performed. The means for the two ownership groups are practically the same in the top fifty category. In the fifty-one and below category the

newspaper group mean is slightly lower than the non-newspaper group.

TABLE 17

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	13.22	10.92	0.478	0.955	2,482
Non-Newspaper	13.94	12.92	1,59	1,59	1,59

Table 17 – Mean number of stories and F-ratios for comparisons of matched television stations.

The question of number of stories is also tied to the question of length of stories. Obviously in the same time period, if you present longer stories you must present fewer stories. To examine this possible confounding the average length of stories was used as the criterion measure in a Type I design as described above. Again no significant effects were found.

TABLE 18

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	86.27	93.61	0.45	1.69	3.48
Non-Newspaper	82.67	86.95	1,59	1,59	1,59

Table 18 – Mean length of stories for each cell and F-ratios for comparison of matched television stations.

Inspection of Table 18 which presents the mean scores and F-ratios however, shows that the newspaper group generally presents longer stories and particularly so in the

smaller markets. This difference easily accounts for the slight differences in number of stories.

Hypothesis 17) Newspaper-allied radio stations will report fewer stories than non-newspaper-allied radio stations.

The approach used with television stations was replicated with the radio stations. Significant differences were found between the market categories. Radio stations in smaller markets generally present fewer news stories. No other effects were significant. Table 19 presents the mean number of stories presented by the two ownership groups in the two market categories. F-ratios for the tests conducted also appear.

TABLE 19

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	13.54	11.39	0.07	0.03	5.31*
Non-Newspaper	13.59	11.83	1,122	1,122	1,122

*Significant at the .05 level.

Table 19 – Mean number of stories presented for each cell and F-ratios for comparisons of matched radio stations.

The average length of stories was also tested in radio. Significant market effects were found in the Type I design. Stations in smaller markets present significantly longer stories than stories presented by stations in the top fifty markets. Differences between stations of different ownership approached significance on this variable ($p. < .10$). Newspaper-allied stations present longer stories

regardless of market than non-newspaper stations. Table 20 displays the mean scores for each cell and the F-ratios for each test.

TABLE 20

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	85.73	109.52	0.31	3.62	28.87*
Non-Newspaper	79.74	98.79	1,122	1,122	1,122

*Significant at .05 level.

Table 20 – Mean length of stories for each cell and F-ratios for comparisons of matched radio stations.

In sum two trends appear, one for each of the two variable utilized in these analyses. The first concerns market size and finds smaller markets presenting fewer but longer stories. The second concerns ownership and shows newspaper allied stations presenting fewer stories but longer stories with the length effect accentuated in the smaller markets.

Hypothesis 18) Newspaper-allied television stations will use fewer sources than non-newspaper-allied television stations.

The number of different sources was used as a criterion measure in a Type I design. Sources were provided by the reporting station for the broadcast scripts (see Appendix A). No significant effects were found in this analysis for television. According to the means presented in Table 21, approximately two attributable sources were used in the average television newscast regardless of ownership or market size.

TABLE 21

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	2.29	2.37	1.16	0.61	0.35
Non-Newspaper	2.32	2.03	1, 59	1,59	1,59

Table 21 – Mean number of sources used for each cell and F-ratios for matched television stations.

Hypothesis 19) Newspaper-allied radio stations will use fewer sources than non-newspaper-allied radio stations.

No significant effects were found in the radio replication of the television analysis. Both ownership and market effects closely approached significance, however. The observed newspaper-allied stations used more sources in their news presentations. Both station sets in larger markets showed a greater number of sources being used. Table 22 furnishes the means and F-ratios from this analysis. It is quite possible that both occurrence

TABLE 22

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	2.43	2.35	1.10	3.87	3.32
Non–Newspaper	2.30	1.96	1,122	1,122	1,122

Table 22 – Mean number of sources used for each cell and F-ratios for matched radio stations.

of larger numbers of sources are functions of economics. Group-owned radio stations and radio stations in larger markets are more likely to have the capability of subscribing to more news services.

Hypothesis 20) Newspaper-allied television stations will present fewer stories written by the local station staff than non-newspaper-allied television stations.

A major question of concern is the amount of local news which is written by the station staff. Relying entirely on outside sources has never been viewed as an adequate discharge of the broadcast news function. Consequently the proportion of stories which were locally written was used in a Type I analysis of variance. Significant ownership effects were found. Table 23 displays the the mean proportions for each cell and the F-ratios of the test run. The means show that newspaper-allied stations write significantly more of the stories presented than non-newspaper-allied stations. No other significant effects are shown.

TABLE 23

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.57	.60	0.01	7.60*	0.19
Non-Newspaper	.44	.47	1,59	1,59	1,59

*Significant at the .05 level.

Table 23 – Mean proportion of stories locally written for each cell and F-ratios for comparisons of matched television stations.

Hypothesis 21) Newspaper-allied radio stations will present fewer stories written by the local station staff than non-newspaper-allied radio stations.

The same analysis was conducted with the scores from radio stations and similar results were obtained. However, the ownership effect did not quite reach the accepted level of significance (p. <.10). Table 24 presents the means for each ownership group and each market category and the F-ratios for the Type I analysis.

TABLE 24

Ownership	Market Size		F-Ratios and Degrees of Freedom		
	1-50	51+	Interaction	Ownership	Market
Newspaper	.56	.57	1.19	3.77	0.92
Non-Newspaper	.47	.54	1,122	1,122	1,122

Table 24 – Mean proporation of stories locally written for each cell and F-ratios for comparisons of matched radio stations.

Looking at the results from both of these tests it appears as if newspaper-allied stations generally write more of the news they present. Non-newspaper-allied stations appear to rely more heavily on outside sources.

SUMMARY AND CONCLUSIONS

The purpose of this study was to determine whether the potential for information control inherent in cross-media combinations was being exercised in the market place. To do so, over 700 broadcast news scripts and newspapers from 49 markets were analyzed for the subject matter presented and for the attitudes expressed in them. On a market by market basis, two sets of compari-

sons were made. The first compared the degree of agreement between a newspaper-allied broadcast station and the allied newspaper with the degree of agreement between the newspaper and the non-allied broadcast station over the topics presented and the attitudes expressed. The second compared a broadcast station allied with a newspaper with a broadcast station not allied with the newspaper over topics presented, attitudes expressed, and a host of measures relevant to the service given to the public. The following is a summary of the cross media findings:

For television: Newspaper-allied television stations were found to have slightly *less* correspondence with their allied newspapers in the topics chosen for presentation, attitudes expressed in the stories, and significantly less agreement in attitudes expressed about items within a story than non-newspaper-allied stations. Non-newspaper stations were shown to express significantly more intense and more negative attitudes about common topics in their stories. Newspaper station attitudes were generally closer to the neutral position. Newspaper-allied stations were found to present fewer topics but longer stories, use approximately the same number of sources, but locally write significantly more of the stories they present.

For radio: Newspaper-allied radio stations generally showed less correspondence with their allied newspapers in the topics chosen for presentation, attitudes expressed in the stories and attitudes expressed about items within a story than non-newspaper-allied stations. Non-newspaper stations expressed significantly more intense attitudes about concepts presented by both station groups. Newspaper-allied stations tended to score more toward the neutral position, but both groups were more negative than positive. Newspaper-allied stations presented the

same number of topics and stories, but their stories were longer. Finally, newspaper-allied stations have a tendency to use more sources in their news broadcasts and to write more of the stories that they present.

From these results we can provide answers to the four questions we formulated in the introduction:

1) Will television outlets commonly owned with a newspaper evidence greater correspondence with that newspaper on subject matter and its treatment than separately owned stations?

The results obviously answer this question in the negative. The statistical analyses of our data clearly indicate similar degrees of correspondence among newspaper and non-newspaper-allied television stations. In fact, if we were to predict differences it would be in the direction of non-newspaper-allied stations showing greater correspondence with the market newspaper. The reason for this occurrence appears to be the heavier reliance of the non-newspaper stations on outside sources of news material.

2) Will radio outlets commonly owned with a newspaper show greater agreement in subject matter and its treatment with that newspaper than separately owned radio outlets?

Again, this question is answered negatively. The radio data appears to replicate the data obtained from the television stations. The effects are not as sharply drawn, however.

3) Within the same market and for stories ascertained to be about the same topic, will the pattern of treatment shown by newspaper-combined stations be different from the pattern shown by non-newspaper-combined stations?

Differences were indeed found. Holding to the traditional (if mythical) norm of "objective" news reporting, non-newspaper-allied television stations were found to deviate from that norm significantly more than newspaper stations in so far as they expressed more intense and more negative attitudes. Non-newspaper-allied radio stations were found to present significantly more intense attitudes in their news reporting.

4) Within the same markets, will the news service provided by newspaper-allied stations be different from the service provided by non-newspaper-allied stations?

In terms of numbers of topics covered, numbers of stories presented, length of stories, and number of sources used no statistically consistent differences could be found. One substantial difference did appear. Newspaper-allied broadcast stations write more of the stories they present. On the basis of this difference the service provided by newspaper-allied stations appears to be better recommended.

[Comments of NAB (1971), pp. 11-24; 59-63]

4. THE NUMBER AND DIVERSITY OF MEDIA OWNERS HAS GREATLY INCREASED OVER THE YEARS.

From time to time casual or uninformed comments are made or appear in publications suggesting that there has been an increasing concentration in media ownership over the years. Unwilling to accept this assumption without investigation, the NAB has commissioned an investigation to ascertain the facts with respect to this aspect of mass media. An extensive study of the matter was undertaken by Professor Christopher Sterling of the School of Communications and Theater of Temple University. The results are set out in NAB Exhibit C which has been filed with the FCC in this proceeding. The report is extensive and detailed and shows that the investigation was undertaken pursuant to rigorous scientific requirements of validation, checking and full disclosure of all data and details. The report speaks for itself and is too lengthy and detailed to attempt to recapitulate. However, the highlights are particularly significant since they not only fail to support the supposition of increasing media concentration but show that this is false and that the contrary is the case.

The Sterling study was made with respect to the one hundred largest markets. These were taken to be the standard metropolitan statistical areas because this was the only statistical device that could be used and projected backwards to provide a continuous series over the entire history of broadcasting. It does not correspond precisely to the ADI market definition used in the Seiden study (NAB Exh. A) but it encompasses the area where a great majority of the U.S. population

lives and, in the absence of ADI data, provides a fair statistical measure of the trends in mass media.

NAB Exhibit C shows that both the total number of media outlets and number represented by separate owners have increased markedly over the period from the beginning of broadcasting down to the latest year for which data are available. This is true whether the group examined is the top ten markets, the top twenty-five markets, the top fifty markets, or the top one hundred. Indeed, it appears that the increases have been largest in the smaller markets of the top one hundred. During the period from the beginning of broadcasting in 1922 down through 1967 the total number of media outlets in the top one hundred markets has increased by a growth rate of 254 percent. The number of broadcasting outlets grew nearly ten times, or 968 percent during the same period.

A statistical measure of media concentration was devised by establishing the ratio of voices, or separate media owners, to numbers of outlets, or separate facilities. This statistical measure shows that media concentration did increase somewhat from 1922 until 1950. However, in all market groups media concentration has decreased since 1950. If broadcasting is considered separately, the results are the same and the statistics show that concentration of ownership in the broadcasting field also peaked in 1950 and has decreased since that time.

Significantly, media outlets have increased at a faster rate than the population. In the top one hundred markets, the media outlets per one thousand of population decreased somewhat from the prosperous 1920's through the depression-ridden 1930's. However since 1940 the number of media outlets per one

thousand population has increased significantly, and by 1967 it was higher than it had ever been before. Media voices, in the sense of separate media owners, have also increased during the same period in relation to population.

Thus, it is clearly demonstrated that there has not been any increase of the concentration of ownership of daily media facilities (that is in broadcasting stations and daily newspapers) in the top one hundred markets since 1950, and at no time has the total proportion of such media held by concentrated owners been more than a third of all such media in those markets. Both the media generally and the broadcasting media have grown less concentrated in the period since 1950.

Newspaper ownership of broadcasting outlets has decreased sharply from the levels of 1940 and 1950 until today less then seven percent of all broadcasting stations are under common ownership with newspapers, and newspaper publishers are less than five percent of all broadcast station owners. A similar conclusion has been reached by ANPA research. ANPA, p. D27-28. Both the numbers and the proportion of broadcast stations not affiliated with any other media in the same market have increased since 1950, while the proportion of broadcast stations affiliated with other media (or other broadcast facilities) in the same market has decreased since 1950.

In addition, ANPA research has disclosed that the number of news reporting agencies has increased very substantially in recent years, ANPA, p. C-12, and ANPA calculates the increase in the number of media voices as amounting to 29% in the last two decades. ANPA, p. D-58. Overall, the outstanding fact is that both the number of separate media and the number of media

owners have increased at a faster rate than population growth and that by any valid statistical measure there is less concentration and greater diversity of ownership in the mass media today than there has been at any time during the last two decades. The trend is clearly toward greater numbers and greater diversity.

5. THERE IS NOW A PLETHORA OF MEDIA DIVERSITY IN THE UNITED STATES AND IN EVERY TELEVISION MARKET.

The proposed divestiture rule is stated in the Further Notice of Proposed Rule Making to have a two-fold purpose, which "is to promote competition and to increase the diversification of program and service viewpoints." Further Notice, para. 2. Similarly, the First Report and Order states that the multiple ownership rules, generally, have a two-fold objective which is, first, to foster maximum competition in broadcasting, and, second, to promote diversification of programming sources and viewpoints. First Report and Order, para. 3.

While diversity of broadcasting sources is thus, quite properly, extolled as socially desirable, it is significant that nowhere in either the First Report and Order or the Further Notice of Proposed Rule Making is any examination undertaken of the degree of diversity now existing in the United States and in the markets which are the subject of this proposed rule. The Further Notice states that 94 television stations are affiliated with newspapers. (para. 31) But this statement, even if accurate, says nothing about the degree of diversity now existing in the United States or in the various television markets. To illustrate, if a market has only

one newspaper, one television station and one radio station, then common ownership of these three media constitutes a relatively high degree of concentration of control. On the other hand, if a market has two newspapers, five television stations and fifty radio stations, and if each newspaper is affiliated with one of the television stations and there is no other cross-ownership, there is relatively little concentration of control in this market. But the method of measurement used in the Further Notice would report the first market as having 1 newspaper affiliated television station and the second market as having 2 newspaper affiliated television stations. Standing alone, such figures would suggest that the second market is more concentrated than the first; although this is obviously a wrong conclusion and the second market has far more diversity of media voices than the first. Simple statistics as to numbers of "newspaper affiliated" or "group owned" broadcasting facilities give no information as to diversity of media. If 94 additional and new television stations were to be established in major markets by newspapers not now affiliated with any broadcasting facility, this should increase, not decrease, any numerical index of media diversity in the markets affected. Yet it would double the simple statistic cited in the Further Notice, and therefore would *appear* to increase concentration, although the actual effect would be the opposite. Consequently it must be concluded that the figures cited in the Further Notice simply are not relevant to the issue of diversity.

The fact is that until the institution of the present proceeding, there has been no general and reliable census of media in the television markets of this country. The taking of such a census is a most difficult and expensive task, as the NAB has discovered.

However, the NAB has felt that the FCC cannot properly and intelligently undertake action in this field, and other parties cannot intelligently comment on the proposed divestiture rule, without information as to the actual amount of diversity in media sources now existing.

Accordingly, the NAB has commissioned a complete study of this subject to be made and has filed the results with the FCC in NAB Exhibits A-1, A-2, A-3 and A-4. These are four volumes comprising a study of the subject "Mass Communications in the United States–1970". Volume 1 is a summary volume which sets forth a description of the methodology followed in the study and also a list of all of the television markets in the United States, comprising some 204, with a table showing the number and kinds of media in each market, the numbers of those originating in the market and the numbers of those entering the market, and the numbers of owners of the media originating in the market and entering the market. Volumes 2, 3 and 4 of this study contain complete listings of all of the media referred to in the summaries in volume 1. The details are too extensive and voluminous to be summarized here and those interested are urged to consult the summary volume. However, the significance of the data presented in this study can be indicated by some brief statistics, and the general nature of the facts presented in this study must be known and understood in order to approach the problems raised by the proposed divestiture rule intelligently.

It is occasionally stated by those who are partisian or uninformed that the media in this country are controlled by a few and that the public has only a very limited number of media presenting news, information

and other programming to it. The facts are completely contrary. The NAB survey of mass communications in the United States covers only television, radio, daily newspapers, weekly newspapers, and national magazines. It does not include numerous other sources such as motion pictures, the theater, CATV, books, local and regional magazines, and other media sources. However, the NAB study shows that even among the broadcasting and journalistic media surveyed there is a plethora of diversity in the United States and in every significant market.

For example, in New York City there are at least 610 media in the market available to the residents. The 610 media are owned by a total of 434 different owners. Of the total number of media in the market, 519 originate in the market and these are owned by 372 different owners. (The source for these and following data is NAB Exhibit A-1.)

The figures are slightly smaller but equally impressive for the other large cities. The average for the top fifty markets shows a total of 217 media available to the residents of each of those markets and shows that the 217 media are owned by 170 owners in each of these markets. The average for the top 50 markets shows 139 media originating in each market, owned by 111 owners.

Moving to the other end of the scale, the smallest markets, the survey shows that the smallest market in the United States is Glendive, Montana. In this market there are a total of 36 media, owned by a total of 30 different owners, which is the smallest number of owners of media in any market in the United States. Of the total number of media in the market of Glendive, there are five originating in the market owned by four

different owners. In terms of local origination, the most concentrated market in the United States is Zanesville, Ohio. This market has only four locally originating media which are owned by two different owners. However, in Zanesville, Ohio, the residents have access to a total of 49 different media owned by 39 different owners.

Looking at the markets in groups of fifty, we find that the average numbers of media both in the market and originating in the market, as well as the average numbers of owners of those media, is very numerous for all markets. The average numbers are set forth in the following table:

Average Number of Media and Owners

	Total number in market		Number originating in market	
	Media	Owners	Media	Owners
Markets 1-50:	217	170	139	111
Markets 51-100:	161	130	80	68
Markets 101-150:	116	95	47	41
Markets 151-204:	76	63	21	18

The best profile that can be presented of the diversity of media and media owners in the television markets of the United States is to show the averages for the quartiles of the markets grouped by size. This is done in the following four tables which show the average number of media and the average number of media owners for the largest fifty markets, the second largest fifty markets, the third largest fifity markets, and the smallest fifty-four markets.

AVERAGE NUMBER OF MEDIA AND MEDIA OWNERS 1970

Markets 1-50

	Total No. in Mkt.	Number Originating in Mkt.	Number Entering Mkt. Total	Number Entering Mkt. +5% of Mkt.
Media	217	139	78	15
Owners	170	111	59	13
TV Stations	18	5	13	0
Radio Stations	65	45	20	1
Daily Newspapers	27	17	10	0
Weekly Newspapers	73	73	0	0
Magazines	35	–	35	14

AVERAGE NUMBER OF MEDIA AND MEDIA OWNERS 1970

Markets 51-100

	Total No. in Mkt.	Number Originating in Mkt.	Number Entering Mkt. Total	Number Entering Mkt. +5% of Mkt.
Media	161	80	81	17
Owners	130	68	62	15
TV Stations	16	3	13	0
Radio Stations	48	25	23	2
Daily Newspapers	19	9	10	1
Weekly Newspapers	43	43	0	0
Magazines	35	–	35	15

AVERAGE NUMBER OF MEDIA
AND MEDIA OWNERS 1970

Markets 101-150

	Total No. in Mkt.	Number Originating in Mkt.	Number Entering Mkt. Total	+5% of Mkt.
Media	116	47	69	18
Owners	95	41	54	16
TV Stations	13	3	10	1
Radio Stations	32	15	17	2
Daily Newspapers	12	5	7	1
Weekly Newspapers	23	23	0	0
Magazines	35	–	35	14

AVERAGE NUMBER OF MEDIA
AND MEDIA OWNERS 1970

Markets 151-204

	Total No. in Mkt.	Number Originating in Mkt.	Number Entering Mkt. Total	+5% of Mkt.
Media	76	21	56	22
Owners	63	18	45	19
TV Stations	9	2	8	2
Daily Newspapers	7	2	5	1
Weekly Newspapers	10	10	0	0
Magazines	32	–	32	15

Simple scanning of these tables should be more persuasive than any amount of hortatory rhetoric with respect to the actual existence of diversity of sources in both broadcasting and the media generally in the markets of the United States. In terms of averages,

from the smallest to the largest groups of markets, the total number of media available to the residents of these markets ranges from 76 to 217, which are owned and controlled by, respectively, 63 and 170 different owners. It certainly cannot be contended rationally that there is any lack or anything less than a plethora, of media in markets which have as many as more than six dozen media available to the residents. Furthermore it must be kept in mind that the media surveyed and referred to above are not all of the media in each market, but are primarily the broadcasting and journalism media.

The suggestion that there is a concentration of control, or a trend toward concentration or lessening of numbers in either broadcasting or journalism is simply not accurate. In the First Report and Order it is said (para. 22) that the number of daily newspapers has been decreasing. This is not correct. The number of daily newspapers has remained substantially the same for the last twenty-five years, as can be ascertained from a number of sources. The Saturday Review (February 13, 1971, pp. 54-55) reports that:

> "In 1946, the number of daily newspapers in the United States was 1,763. Twenty-three years later, on January 1, 1970, the number was 1,761—a loss of two. In this outwardly static history there was considerable internal ebb and flow.
>
> * * *
>
> The modernization of the small-town newspaper dramatizes a striking difference between the newspaper industry and most other since the Second World War. While other industries have advanced with larger firms swallowing up the

smaller and weaker, in the newspaper industry the stability and growth of the small and weak have been at the expense of the strong. Based on newsprint consumption, here is the pattern of growth in cities of various sizes in the Wisconsin report:

Population	Percentage of Increase
one million or more	41.3
500,000 to one million	50.1
250,000 to 500,000	60.8
100,000 to 250,000	62.3
less than 100,000	93.2

In plain English, the smaller the city the greater the growth. The index of newsprint consumption is the most significant measure of newspaper growth, according to the Wisconsin report. Here is the real explanation of the paradox of an almost zero growth in the number of daily newspapers in the midst of overall industry expansion."

The situation with respect to the diversity of media in the United States has been well summarized by the respected reporter James Reston, who has written as follows:

> "Actually, with the rise of television and radio broadcasting stations, the sources of information in the United States have dramatically increased in recent decades, breaking the monopoly of the printing press.
>
> * * *
>
> Out of this vast network of stations and newspapers now pours out night and day the greatest flow of information and the loudest clash of divergent opinion ever inflicted on a long-suffering people in the history of the written and spoken word." (N.Y. Times, Nov. 21, 1969, p. 46)
>
> * * *

10. FORCED DIVESTITURE WOULD IMPOSE A VAST AND UNNECESSARY BURDEN ON THE MASS COMMUNICATIONS SYSTEM WHICH WOULD TEND TO DETERIORATE PROGRAM QUALITY AND DECREASE PROGRAMMING DIVERSITY.

The NAB has made no separate study of the economic burden that would be imposed upon the mass media by the proposed divestiture rule but has had access to the economic studies commissioned by the ANPA. To the extent that these studies are corroborated by the accumulated experience and observation of the NAB officials they are relied upon.

Briefly summarizing the situation it appears that the proposed divestiture rule would require the divestiture of approximately 475 separate broadcasting facilities owned by newspapers. See ANPA pp. A-7 and B-4. (Although the ANPA studies refer to 332 broadcast properties they count 143 combined AM and FM stations as single facilities rather than as 286 licensed facilities.) In addition to these stations there are several hundred combination television and radio stations that would be affected by the proposed divestiture rule. The total value of all these broadcasting facilities cannot be ascertained precisely but the ANPA studies indicate the value of newspaper owned facilities will aggregate about $2 billion. ANPA p. A-8. From these data it can be extrapolated that the value of jointly owned television and radio facilities will aggregate about another $1 billion. Furthermore, it is obvious that the value of these broadcasting facilities will be substantially depressed by the proposed divestiture rule which will force an abnormally large number of properties onto

the market within a relatively short period of time. The depression in values that will thus occur is estimated to be between 10% and 40% of the total value. ANPA pp. A-11 and B iii.

It further appears that the original cost of the properties involved in these broadcasting facilities is considerably less than either the replacement value of the tangible assets or the appraised present value of such assets. ANPA p. B-5. The difficulties of raising the capital necessary to purchase these very numerous and very valuable communication facilities are many and substantial and are spelled out in considerable detail in the ANPA studies. Among other things, it is shown that the purchasers will have to pay high interest charges on capital borrowed to purchase diverted facilities. ANPA p. B-23,

From these and other detailed facts spelled out in the ANPA studies it becomes certain that forced divestiture of the properties that would be effected by the proposed rule will impose a very great financial and economic burden upon the owners and operators of these communications facilities, and therefore upon the communications system. This economic burden will necessarily have consequences that are directly contrary to the objectives sought by the FCC and will inevitably frustrate the aims of the proposed divestiture rule.

As demonstrated in the studies referred to above, most of the broadcasting properties which would be affected by the proposed divestiture rule have a relatively low original cost. In many cases these facilities have been owned by their present licensees for many years. The tangible properties have been accumulated over a long period of time. In some cases the tangible properties may now be fully depreciated even

though they are still entirely useful. There is nothing particularly unusual about this situation. Many homeowners are now living in housing that they purchased years ago which is worth vastly more than their original cost. Furthermore, like the owners of business properties, many homeowners have invested relatively small amounts in their houses over the years so that the aggregate market value of the house today is very much above the original cost plus the cost of the improvements over the years. This disparity is increased with respect to business properties by the fact that they are depreciated over time as a result of tax considerations. Thus it is inevitable that the market value of the broadcasting facilities which would be affected by the proposed divestiture rule is considerably greater in virtually all cases than the cost to the present owners.

As a consequence of this factor the purchasers, assignees, and new owners of the affected broadcast facilities, whoever they may be, will become owners at a very substantially increased cost over the present owners and licensees. This means, among other things, that the expenses of the new owners will be very much greater than the expenses of the present owners. To begin with, the new owners will have to meet payments on the capital costs of the properties purchased. This will be true regardless of whether or not the new owners pay their own capital out of savings or accumulated earnings, borrow the money to make the purchases, or purchase from the present owners and licensees on an installment basis. In addition to the payments that will be required for capital costs, the new owners will be required to pay interest on any monies borrowed and will also be required to earn a reasonable return on a much higher investment than any of the present owners and licensees have.

By thus increasing the capital cost of the broadcasting properties affected by the proposed divestiture rule and increasing the expenses which will have to be borne by the new owners, the proposed divestiture rule will inevitably decrease the amount available to be spent for programming, including news, since it will certainly not have any tendency to increase broadcasting revenues.

The effect of this should be apparent to the FCC which has some experience with these matters in the field of common carrier rate regulation. The effect of the proposed divestiture rule on the broadcasting industry will be approximately equivalent to the effect on telephone rates that would follow if the rate base were suddenly doubled without any other change in equipment or accounting or financial statements. It is obvious that this effect is to increase the cost to the consumer without improving the quality of service. Similarly, in the broadcasting field the effect will be to decrease the amount available for programming without significantly affecting any of the other elements in the situation. One does not need to be an expert to understand that if the amount of money available for programming is substantially decreased both the quality and the diversity of programming will be substantially decreased. Consequently it is apparent that the inescapable economic effect of the proposed divestiture rule will be to deteriorate program quality and decrease programming diversity without compensating benefits to the public.

[Sterling, "Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922-1967" (March 5, 1971) (NAB Exhibit C), pp. 1-31]

Brief Summary of Major Findings

1. There has *not* been an increase in concentration of ownership in daily media (broadcasting stations and daily newspapers) in the top 100 Standard Metropolitan Statistical Areas since 1950. At no time has the total proportion of such media held by concentrated owners been more than a third of all media. (see p. 21).

2. Similarly, broadcasting ownership has grown slightly less concentrated in the 1950-67 period. (see p. 22).

3. Newspaper control of broadcasting outlets has decreased sharply from levels of 1940 and 1950 until today less than 7% of all broadcasting stations are under press control. Newspapers publishers make up less than 5% of all broadcast station owners. (see pp. 24-25).

4. The proportion of independent (single) broadcast stations has increased since 1950 while the proportion of multiple (radio-TV, or AM-FM in the same market) has decreased. This growth of independent stations has been especially pronounced in the top 10 and top 25 markets. (see p. 24).

5. Group or conglomerate control of broadcasting stations has increased sharply since 1950. It is suggested, however, that such owners derive their economic muscle from stations in many separated markets rather than concentration in a single market. (see pp. 25-27).

6. Media outlets (stations and newspapers) and voices (owners) have increased at a faster rate than population growth. The future trend cannot be predicted without making assumptions about technology and economics that go beyond available evidence. (see pp. 28-29).

Introduction: The Problem

On March 25, 1970, the Federal Communications Commission (FCC) adopted its proposed rule barring the owner of any full-time broadcasting station from acquiring another in the same market, whether AM, FM, or television. At the same time, the Commission gave notice of a further proposed rule-making to require, within a five-year period, that any existing broadcasting combinations be required to divest themselves of media such that they would be reduced to no more than an AM-FM combination, a television station, or a newspaper in any single market area. There were some suggested exceptions to the ruling as proposed, but in essence it marked the clearest FCC stand on ownership since overall station ownership limitations were last adjusted in 1954.

The proposed rule-making was based on several assumptions regarding media ownership patterns and trends. In response to the FCC proposed rule-making, the National Association of Broadcasters (NAB) decided to initiate a number of studies, to examine these assumptions. One would examine the status of media ownership today, another would analyse past trends in ownership as well as other studies. The first of these has already been filed and publicly reported (see "Seiden Counts a Multitude of Media," *Broadcasting*

(February 1, 1971), pp. 34-35), and the second is offered now. As will be seen in the sections of this report on Methods and Approach, Definitions-Explanation of Materials, and Limitations, the present study differs in several ways from the Seiden research, but the overall applicability of this work with the Seiden study still should be apparent. Used together, the two studies present a picture of ownership characteristics in media spanning nearly half a century.

This study seeks only to answer the question *how much* media control has been concentrated in selected past years—i.e., what has been the ownership trend? To seek out the answers to this question and related ones, the following hypotheses were tested:

A. Trends in Number of Media

1. That the total number of media outlets has increased over the period covered (1922-67).
2. That the total number of media voices has increased over the period covered.
3. That the total number of broadcasting outlets has increased over the period covered.
4. That the total number of broadcasting voices has increased over the period covered.
5. That the total number of daily newspaper outlets has decreased over the period covered.
6. That the total number of daily newspaper voices has decreased over the period covered.

B. Ownership: General

7. That media ownership (the proportion of voices to outlets for both broadcasting stations and daily newspapers) has become more concentrated since 1950.

C. Ownership: Broadcasting

8. That broadcasting station ownership (the proportion of voices to outlets) has become more concentrated since 1950.
9. That the proportion of independently-owned (single) station outlets has increased while the proportion of multiple-owned broadcasting outlets has decreased since 1950.
10. That the proportion of independently-owned (single) station voices has increased while the proportion of multiple-owned broadcasting voices has decreased since 1950.
11. That the proportion of newspaper-controlled broadcasting outlets has decreased relative to all broadcast outlets.
12. That the proportion of newspaper-controlled broadcasting voices has decreased relative to all broadcast voices.
13. That the proportion of group and conglomerate-controlled broadcasting outlets has increased relative to all broadcast outlets.
14. That the proportion of group and conglomerate-controlled broadcasting voices has increased relative to all broadcast voices.
15. That AM-FM combinations have increased at a faster rate than radio-TV combinations since 1950.

D. Ownership: Newspapers

(Because this study was of broadcasting ownership specifically there are no hypotheses concerning newspapers except those noted in five and six above, and those concerning newspaper ownership of broadcast stations)

E. Media and Population Growth

16. That in the markets studied, the number of media outlets has increased at a faster rate than population.
17. That in the markets studied, the number of media voices has increased at a faster rate than population.

It is assumed that readers of this study are acquainted with the major institutions and structure of American broadcasting. It is believed, for the reasons stated in subsequent sections, that the method used here (see next section) will give a valid picture of actual trends in the markets studied over the years covered (see also section on Limitations, on p. 16).

Methods and Approach

This project, like most, has had two major parts—seeking out and recording primary data, and analysis of that data in light of pre-established hypotheses. In this section the mechanical process involved in such gathering, recording and analysing is briefly described.

Structuring the sample. Having established the period for investigation (the years when broadcasting stations existed), it was decided to collect data for the years 1922 (the first year when sizable numbers of broadcasting stations were on the air), 1930, 1940, 1950, 1960 (years when data could be compared to the

decennial census), and 1967 (the last year for which redefinition of Standard Metropolitan Statistical Areas (see section on Definitions-Explanation of Materials on p. 11) was available), thus giving us six sample years in nearly a half century of change in both broadcasting and daily newspapers. To keep the project clearly defined and to save time, it was decided at the outset to use SMSAs as the unit of measure of each market, counting not the media actually received in each area, but only the media actually originating there (see Limitations on p. 16).

SMSA data gathering. The list of 100 top SMSAs as of 1967 was taken from Census Bureau data (see Appendix D), and population figures for 1920, 1930, 1940, 1950, 1960, and 1967 were derived from the same source (see Appendix F and G). For 1920 and 1930 it was necessary to "reconstruct" SMSAs as that data tool did not exist then, so population data for counties within the 1967 SMSA definitions were added to approximate the earlier data so as to make the entire project comparable. With basic data at hand, percentages of increase (or decrease) were figured on a Friden programmable calculator.

Broadcast data gathering. The next step was to gather broadcast station ownership information for the selected years. As there was no *Broadcasting Yearbook* published in either 1922 or 1930 (the first came in 1935), data for those year came from other (primarily government) sources (see Appendix H). Data for 1960 was gathered first under the assumption that most varieties of ownership would have shown by that time, so that any unforseen problems could be worked out. As a result of using 1960 information this way, worksheet design was changed, definitions were refined and similiar operational changes were made. Broadcasting data was then recorded for 1920, 1950, 1930, 1940, and 1967 (the odd order being set primarily by

initial availability of source material). As the project assistant (see Appendix I) finished entering data for each year, he and the principal investigator went over that data, checking trends and spot-checking for errors or unusual data situations requiring double-checking.

Newspaper data gathering. Newspaper information was retrieved from *Editor and Publisher Yearbook* for each sample year.

The broadcasting and newspaper data was entered on worksheets (see sample on following page). Final typed copies of that data for each market for each sample year are presented in Volumes II through VII of this report.

Tabulation process. After the more than 800 pages worth of raw data were collected, the next step was to assemble the material into tabular form. Having analysed the hypotheses and data, tables were devised (see Appendices A, B and C). After a good deal of work by several people, a sheet for tabulating data (the mid-way point between the worksheets and final tables) was devised (see sample on page after next). Some 10 people, mainly graduate students were recruited and trained to enter the worksheet data onto the tabulation sheets. Students worked in pairs and each tabulation sheet was double-checked by a different person. Proportions and population data were then figured on a Friden programmable calculator and were entered on each sheet.

Table construction. The completed tabulation sheets (one for each market for each year, or 600 sheets) were then used to fill in the tables. The principal investigator and his wife did this job because of the need for constant cross-checking and complete familarity with the data. As Tables C (Outlets) and B (Voices) were

Market_____ Year-Page_____

1967 SMSA Rank_____ Population for Date_____ % Change_____

Broadcasting Stations

Call letters	AM	FM	TV	Ind.	Newsp.	Group	Congl.	Name of Ownership Unit
								TOTALS

Daily Newspapers

Title (Place)	Ind.	More	Beast.	Group	Congl.	Name of Ownership Unit

filled in, constant checking of previous figures, math, and machine calculations was done to assure accuracy in data handling and transfer. Table A, derived in part from Tables B and C and in part directly from the tabulation sheets, served as further opportunity for further cross-checking and took more than a week to complete itself.

The final step in the project was analysis of the resulting data and writing of this final report.

Definitions-Explanations of Materials

This report comes in two parts—the detailed reports of media holdings in each of the top 100 SMSAs (found in volumes II through VII), and the summary tables (Appendices A, B and C) and report derived from that specific data. The definitions and explanations below follow the same division, giving information first for the worksheets (Volumes II through VII) and then for the tables and report in this volume.

First of all, some general definitions referring to the entire project (worksheets and final tables):

- media: educational and commercial broadcasting stations (AM, FM, and TV) and daily newspapers

Market Data

- SMSA: Standard Metropolitan Statistical Area as defined by the Bureau of the Census, Department of Commerce. For the purposes of this report, the definitions are those of 1967 (see Appendix D).
- top 100: the first 100 SMSAs as ranked in 1967. For ease in comparison, the exact order used in 1967 will be used in all years even

though many markets (especially those in the South and West) didn't actually get into the top 100 until after World War II or later, and the rank order of others has changed over the years.

- market or local market: any one of the top 100 SMSAs as ranked in 1967.
- population: with the exception of 1922 media information, the population shown on the worksheets is for the same year as the market information. Media data for 1922 is compared with population data for 1920, the last regular decennial census. Population figures are those of the respective decennial years with the exception of 1967 which are Bureau of the Census estimates for that year (see Appendices F and G). "Percent Change" figures refer to the growth of population in that market since the previous census.
- top 10, top 25, top 50, top 100: break-outs of groups of the top 100 SMSAs.

The definitions which follow next refer specifically to the headings found on the worksheets (Volumes II through VII) and are divided into broadcasting and newspaper sections like those sheets.

Worksheets: Broadcasting

- call letters: shown as listed in each year's *Broadcasting Yearbook*. If more than one set of call letters is shown, it indicates one of the stations in a combination (radio-TV or AM-FM) has call-letters differing from the other(s). Additional information is given here in three cases:
  - E: educational and/or noncommercial station (after call-letters).
  - *: stations assigned but not yet on air
  - +: stations assigned but now off air having once been on.

– AM-FM-TV: an "x" in one of these columns indicates the station(s) using the call letters. Totals for each market are shown at the bottom of each column.

– ind(ependent): a station or combination of stations (AM-FM, or radio-TV) licensed to an individual, firm, or institution which does not control any other medium in that market or elsewhere.

– newsp(aper): a station or combination of stations licensed to an individual, firm, or institution which also has controlling interest in a newspaper in the same market (controlling is defined as "more than half *or* the biggest single share, whichever is applicable").

– group: a station or combination of stations licensed to an individual, firm, or institution which also has controlling interest in broadcasting stations in other markets.

– congl(omerate): a station or combination of stations licensed to an individual, firm, or institution which also has controlling interest in other media in other markets as well as other (non-media) business interests.

– name of ownership unit: this is shown only for those stations not listed as independent. In the case of newspaper control, the local newspaper is listed by title. Location of station, if other than the named SMSA city, is noted in parentheses.

Worksheets: Daily Newspapers

– title (place): Masthead title of daily (morning or evening) newspaper and city in which it is located, if other than the named SMSA city. Any daily newspaper shown as being a part of that market (see Method and Approach on p. 7)

is listed even if it is of specialty interest (e.g., *The Daily Racing Form* or business-emphasis dailies).

– ind(ependent): a single newspaper under an owner which does not control any other medium in that market or elsewhere.

– more: a single newspaper under an owner which also has controlling interest in another newspaper (or newspapers) in the same market.

– b(road)cast: a single newspaper under an owner which also has controlling interest in a broadcast station or combination of stations in the same market (controlling is defined as "more than half *or* the biggest single share, whichever is applicable").

– group: a single newpaper (or newspapers) under an owner which also controls one or more newspapers in other markets.

– congl(omerate): a single newspaper under an owner which also has controlling interest in other media in other markets as well as other (non-media) business interests.

– name of ownership unit: shown only for those newspapers not listed as independent. In the case of broadcast station ownership, the local station call letters will be listed.

Worksheets: Important Note

– on ownership: in both the broadcasting and newspaper sections, with the exception of those media noted as being independently owned, more than one of the categories noted above may be applicable (e.g., a radio station could be owned by a conglomerate with a local newspaper and a group of broadcasting stations). In such cases, only a single ownership designation

has been made—to the highest degree of concentration applicable. The way the worksheets are set up, this would mean placing an "x" as far to the right as applicable to avoid double-counting a single unit of the medium under several ownership possibilities (in the example just given, an "x" would be placed under "congl(omerate)" for both radio station and newspaper).

In putting together the summary tables in this volume, some variation in this usage was necessary to more clearly explain the data. As will be seen in appendices A, B, and C, there are three different basic tables on which all data is summarized. The definitions below are presented, as for the worksheet information above, in the order (left to right) of the headings on each set of tables. As Appendix table A is derived from Appendix tables B and C, definitions will be given starting with Appendix table C.

Appendix Table C: Outlet Summary

- outlet: individual unit of daily mass media (i.e., an AM, an FM, or a TV station, or a daily newspaper) in a given market.
- rank and market name: the common short name for the market, with a number indicating the SMSA rank held in 1967.
- b(road)cast stations: four columns here show the total number of stations in each category (AM, FM, and TV) with the last column being a total of all stations in that market that year.
- indep(endent) prop(ortion): shown only for 1950, 1960, and 1967, this figure shows the proportion of single stations (no matter how owned) to all stations in the market. Figure rounded to nearest tenth (e.g., .078 becomes .08, .064 becomes .06).

- mult(iple) prop(ortion): shown only for 1950, 1960, and 1967, this figure shows the proportion of multiple station combinations (AM-FM, or radio-TV), no matter how owned, to all stations in the market. This figure and the one just above (to the left on the table) should add up to 1.00 though small variations may be present due to rounding. Figure rounded to nearest tenth.
- newsp(aper) prop(ortion): figure shows the proportion of outlets controlled by newspapers in the same market. Figure rounded to nearest tenth.
- group prop(ortion): figure shows the proportion of outlets controlled by group *and* conglomerate owners. Figure rounded to nearest tenth. *Note:* for purposes of tabulation here, "group" and "conglomerate" categories which were shown separately on the worksheets, are here combined under one heading because (1) the study concentrates on media holdings in individual markets and thus the group-conglomerate difference is not critical, and (2) the line between groups and conglomerates often was hard to draw because of reliance on secondary source materials often lacking complete data for conglomerates. If a station is part of a group or conglomerate also owning a newspaper in the same market, the station was tabulated twice—under newspaper proportion and under group proportion so that both figures would be fully meaningful while at the same time not being additive.
- newsp(aper) total: the total number of different daily newspapers in the market area, regardless of ownership.

– total outlets: the total of broadcast and daily newspaper outlets shows the total number of media outlets originating within the SMSA.

Appendix Table B: Voice Summary

– voice: single ownership unit of daily mass media (e.g., an AM-FM-TV combination is a single voice owning three outlets) in a given market.

– rank and market name: see Appendix Table C.

– broadcast stations: figures in these four columns show stations or station combinations under one owner including (1) single stations (where outlets and voices are the same), (2) AM-FM combinations, and (3) radio-TV combinations (including AM-TV, FM-TV and AM-FM-TV). The total column is a count of all broadcast voices (or owners) in the market.

– indep(endent) prop(ortion): figure shows the proportion of single-station voices to all broadcast voices in the market. Figure rounded to nearest tenth. Shown only for 1950, 1960, 1967.

– mult(iple) prop(ortion): figure shows the proportion of multiple-station voices to all broadcast voices in the market. Figure rounded to nearest tenth. Shown only for 1950, 1960, 1967.

– newsp(aper) prop(ortion): figure shows the proportion of voices controlled by newspapers in the same market. Figure rounded to nearest tenth.

– Group prop(ortion): figure shows the proportion of voices controlled by group *and* conglomerate owners. Figure rounded to nearest tenth. See also "*Note*" under this heading for Appendix Table C.

– newspapers: these two columns show the total number of newspaper voices in the market, and the total number of ind(ependent) newspaper voices which is the same as total voices unless some voices have broadcasting interests. Broadcast-connected newspaper voices are subtracted to give an artificial figure useful only in getting the last column (total voices) because otherwise cross-media owners would be counted twice—once under broadcasting, and once under newspapers.

– total voices: sum of broadcasting voices and independent newspaper voices shows the total number of media voices originating within the SMSA.

Appendix Table A: Media and Population Summary

– rank and market name: see Appendix Table C.

– outlets: these four columns show (1) the number of broadcast outlets, (2) the total number of daily media outlets (both of these columns taken from Appendix Table C), (3) the number of outlets per 1000 population, and (4) the number of people per outlet in the market area.

– voices: in a similiar fashion, these four columns show (1) the number of broadcast voices, (2) the total number of daily media voices (both of these columns taken from Appendix Table B), (3) the number of voices per 1000 population, and (4) the number of people per voice in the market area. *Note*: as there are usually fewer voices than outlets, there will nearly always be more people per voice than per outlet, and fewer voices per 1000 population than outlets per 1000.

– prop(ortion) of voices to outlets: these two columns give proportions which show (1) the proportion of broadcast stations which are concentrated (that is, held by owners of more than one outlet per voice *in that market*), and (2) the proportion of all daily media (broadcasting stations and daily newspapers) which are concentrated (that is, held by owners of more than one outlet per voice *in that market*). In either case, group or conglomerate owners with only a single outlet in the market will be counted as *un*concentrated owners in that market. The smaller the number or proportion, the closer that market is to total lack of concentration (.00 shown as ——). Figures rounded to nearest tenth.

In all cases in the tables, a figure of less than .01 (rounded to the nearest tenth) is shown simply as a dash. Each of the Appendix tables has a four page summary which shows information (1) by market group (top 10, top 25, top 50, and top 100) per year, and (2) by year per market group. The two summaries (each two pages long) have identical information presented two different ways for comparison variability.

Limitations of the Study

The following points are suggested as the major limitations in the study and its results:

1) SMSA limitation: As basic tool in delineating markets, the study uses the artificial SMSA geographical definition (which follows political (county) lines) rather than the larger area of the Area of Dominant Influence (ADI), the more common method in broadcast audience research of determining true coverage of stations, or the

overall economic market area (which would record the Los Angeles area as a single market rather than the two SMSAs used here). Many ADIs or economic market areas are broken up here into smaller SMSA units which are artificial as far as media reception is concerned, and thus often do not adequately reflect the true coverage, circulation, or ADI of either print or broadcast media. Because the ADI is a relatively new concept, however, the SMSA was used as the simplest means of delineating markets and obtaining comparable population figures over a long span of years. Use of the SMSA probably tends to overstate the decline in the number of newspapers, since the principal newspaper growth in recent years has occurred in the suburbs, and often beyond the SMSA.

2) Media Exclusions: Only newspapers published at least six times a week (daily) and broadcasting stations are covered in this study. The study omits weekly (or other periods of issue) newspapers, all magazines (many of the bigger markets have magazines originating within the SMSA), books, CATV systems (an increasing number of the larger systems are doing some local origination) etc. It is believed that the dailies and stations reported here represent the predominent daily media potential for news and entertainment communication in the 100 top SMSAs. In a very few cases in 1960 and 1967, some broadcast stations not yet on the air, or once on but then off, were recorded as normal outlets and voices on the air. Such stations are clearly marked in the worksheets, but to avoid complications in tabulation, they were simply included as normal broadcast operations. Because of their limited numbers, it is not believed they will harm the data to any statistically significant degree.

3) Secondary Sources: Because of time limitations, only *Broadcasting Yearbook* (plus other source material for 1922 and 1930 broadcast information), and *Editor and Publisher Yearbook* were utilized. No attempt was made to check the data in these secondary sources with primary FCC information or with other sources (such as *Ayer's Directory of Newspapers and Periodicals*). The data presented thus depend in large part on the validity of information provided in these publications.

4) Use of 10 Year Periods: Because of time limitations, the study could not be based on single or five year intervals, so even decades were chosen because (1) it was felt trends would be fairly represented in that period of time, and (2) adequate and comparable population data was available in the decennial census years.

5) Uneven "Tails": 1922 and 1967 were the first and last years for which data was collected rather than 1920 and 1970 because (1) there was virtually no broadcasting in 1920, so 1922 was chosen as the earliest year when sizable numbers of broadcast stations could be compared to newspapers, and (2) 1967 marked the last re-definition of SMSAs with new population estimates available before 1970 census data (which, along with 1970 media information, was not yet available).

6) Hand Processing: Primarily because of time limitations (but also because of the difficulty in transferring worksheet data to punch cards), the decision was made to hand-tabulate the data rather than submitting it to key-punching and computer analysis, which might have led to more reliable tables and analysis. The raw data are at hand, however (see Volumes II through VII), so that additional analysis,

using such computer processing is still possible in the future.

7) Estimated Rate of Error: In an effort to provide readers with an estimate of data collection, transfer and tabulation, and arithmetic analysis reliability, the following check was made. At the worksheet stage, before tabulation, every tenth market was checked with the original source material by someone other than the project assistant who did the original work. When the two sets of worksheets for those markets were compared, it was found there was an error rate of approximately 3% for broadcasting data and 2% for newspaper information. This ratio applied to any information supplied for either medium. When the worksheets were typed to make final copy for Volumes II through VII, a random check of ten markets was made to assure reliability of data transfer. In the tabulation process, all transfers, math work, and machine calculations were done twice by two different people. Transfer of data from tabulation sheets to tables was also double-checked. Appendix Table A provided the last check as it correlated the results of Appendix Tables B and C. In all cases, when rounding proportions, anything less than .005 was rounded down, and .005 was rounded up.

Results

The final results of this study are presented on the following pages in numbered sections corresponding to the hypotheses on pp. 4-5.

A. Trends in Number of Media

1. In the 1922-67 period, the total number of daily media outlets has increased by a factor of 254%. This is a combination of great broadcasting growth and limited newspaper decline (see paragraphs three and five below). See Table 1 for specific figures.

2. In the same period, the total number of daily media voices has increased as well, though not as much or as fast, by a factor of 166%. Again, this rate of increase is a confirmation of fast growth in broadcasting and limited newspaper decline (see paragraphs four and six below). Specific figures are in the following table:

Table 1: Total Media Outlet/Voice Growth

	Outlets		Voices	
Market Group	Growth Rate	1922 to 1967	Growth Rate	1922 to 1967
Top 10	168%	286 to 767	103%	271 to 550
Top 25	195	436 to 1288	128	401 to 916
Top 50	226	635 to 2067	162	599 to 1476
Top 100	254	877 to 3104	166	829 to 2205

Source: Appendix Table A-1

3. The number of broadcasting outlets grew nearly ten times or 968% from 1922 to 1967. As is seen in Table 2, the growth rate was especially high in the smaller markets (below the top 25).

4. Broadcasting voices increased by a hefty margin as well—676%, with the greatest growth again coming in the smaller markets as is seen in the following table:

Table 2: Broadcast Outlet/Voice Growth

	Outlets		Voices	
Market Group	Growth Rate	1922 to 1967	Growth Rate	1922 to 1967
Top 10	642%	81 to 601	440%	81 to 437
Top 25	675	134 to 1038	459	134 to 749
Top 50	815	185 to 1692	565	185 to 1231
Top 100	968	242 to 2585	676	242 to 1877

Source: Appendix Table A-1

5. In newspapers, the growth pattern has been a negative one of relative and absolute decline. The number of daily newspaper outlets in the top 100 SMSAs declined by nearly a fifth, as shown in detail in Table 3.

6. The number of daily newspaper voices declined by a third as seen in the data presented in the following table:

Table 3: Newspaper Outlet/Voice Decline

	Outlets		Voices	
Market Group	Decline Rate	1922 to 1967	Decline Rate	1922 to 1967
Top 10	- 19%	205 to 166	- 38%	197 to 122
Top 25	- 17	302 to 250	- 34	288 to 189
Top 50	- 17	450 to 375	- 34	434 to 288
Top 100	- 18	635 to 519	- 33	603 to 403

Source: Appendix Tables B-1 and C-1

The erosion of newspaper outlets and voices is remarkably similar in all market groups of the top 100, with little variation except for the increase in concentration in the top 10 SMSAs.

B. Ownership: General

7. The most important single hypothesis in the study is rejected; there has *not* been an increase in concentration of ownership in daily media in the top 100 SMSAs since 1950. The total proportion of concentration (voices to outlets), as seen in Table 4, has never gone over a third of all media and, indeed, has dropped slightly since 1950:

Table 4: Media Concentration

Market Group	1922	1930	1940	1950	1960	1967
Top 10	.06	.12	.16	.30	.29	.28
Top 25	.08	.12	.18	.32	.29	.28
Top 50	.06	.10	.20	.32	.29	.29
Top 100	.06	.09	.21	.32	.30	.30

Source: Appendix Table A-1

Although the proportions vary a point or so, there is no significant difference between the top 10, top 25, and top 50 markets—all "peaked" in 1950 and have dropped slightly since then, at no time going over a third of all media. The reasons for this pattern are numerous but probably most important is that opportunities for new owners in broadcasting have expanded faster than daily newspaper opportunities have declined. Since 1950, AM, FM, and TV stations have increased by large percentages (see Table 2), while the total number of daily newspapers has declined by 18%. As broadcasting, with technical limits on its expansion, has grown, while newspapers, without such limitations, have declined, it would appear media

economics is the key factor in media growth or decline. While broadcasting has developed two new services since World War II (FM and TV), newspapers have had no corresponding technical break-through, and the resulting decline has led to greater concentration in the press (Table 3) than in broadcasting (see paragraph 8).

C. Ownership: Broadcasting

8. Paralleling overall daily media ownership, concentration in broadcasting has not increased since 1950, and indeed has declined slightly as is seen in the following table:

Table 5: Broadcasting Concentration

Market Group	1922	1930	1940	1950	1960	1967
Top 10	–	.02	.02	.34	.28	.28
Top 25	–	.03	.04	.33	.29	.27
Top 50	–	.02	.04	.32	.28	.27
Top 100	–	.01	.06	.28	.27	.27

Source: Appendix Table A-1

Prior to 1941, there was little concentration because all stations were AM and in almost no case did one owner have more than a single outlet in the same market area. With the post-war rise in FM and television, AM station owners were naturally some of the first to build the new services—thus leading to the major spurt in concentration evident in 1950. As television growth was "frozen" for a few years after 1948, and FM had

peaked and begun to fall before 1950, neither medium had grown large or fast enough by that time to allow major independent (from AM control) growth. By 1960 however, nearly eight years from the end of the television "freeze," TV stations had grown from 103 outlets in 1950 to 352, and FM, which had been in decline during most of the 1950s, was on the rebound and nearly doubled in size from 354 to 673 outlets. The growth trend in both services (as well as AM) continued to 1967 with an increasing amount of this growth being due to independent owners. The implications of all this is important: an increase in (1) types of service, and/or (2) number of channels for each type, will accomplish by normal business market competition what the Commission now proposes to accomplish by rule-making. The proportion of concentrated owners in the top 100 markets went up sharply from 1940 to 1950 simply because old-line AM operations were able to act faster than newer voices in the field. Thus 1950 can be seen as the high-water mark of broadcasting's "old order" for after that date many new voices entered the three services. The slight decline in concentration since 1950 is due mainly then to the steady availability of economically-viable channels in three different services which allowed new blood to enter the business. FM and UHF television especially helped provide expansion room for broadcasting as desired AM and VHF television channels filled up. At present, however, the number of available channels (technically and economically available) in the top 100 SMSAs is dwindling so that it's likely that only owners with the resources of concentrated buying power will be able to pay the increasing costs of station purchase brought about by heightened competition for the few remaining channels. Future technological breakthroughs

may change this outlook, but that is beyond the scope of the present report.

9. As can be seen in Table 6, independently-owned broadcast outlets and multiple-owned broadcast outlets have maintained a steady balance since 1960 after independent stations overtook multiple stations in the 1950s.

10. Unlike outlets, there is a significant difference in independent vs. multiple broadcast voices because the former has grown while the latter has declined (though again, most of that trend came in the 1950s and status quo has been maintained since 1960) as is seen in this table:

Table 6: Broadcast Independent/Multiple Owners

	Outlets			Voices		
Market Group	1950	1960	1967	1950	1960	1967
Top 10	.37:.63	.50:.50	.50:.50	.55:.45	.69:.32	.69:.31
Top 25	.40:.60	.48:.52	.50:.50	.53:.43	.62:.35	.68:.32
Top 50	.43:.57	.50:.50	.51:.49	.57:.41	.67:.32	.69:.31
Top 100	.48:.51	.51:.48	.49:.50	.60:.37	.68:.31	.67:.32

Source: Appendix Tables C-1 (Outlets), and B-1 (Voices). In ratios, independent proportion shown first. Figures may not add to 1.00 due to rounding of sub-totals.

Looking at data for outlets, it can be seen that independent (single-station) owned outlets have increased their position to equality with multiple-owned outlets in the top 10 and top 25 markets, whereas in markets 51-100, the situation has remained relatively stable throughout the period. On the other hand, data for voices shows relative growth of independents over

multiples in all market groups, though the rate of growth for independents was again sharpest in the top 50 markets. Clearly, while the total number of broadcast voices is going up, the number of outlets which constitute one multiple voice are also going up as there are far more AM-FM and ratio-TV combinations in 1967 than there were in 1950. The concentration proportion (see paragraph 8, above) however, has remained constant between voices and outlets of both kinds.

11. The proportion of newspaper-controlled broadcasting outlets has decreased sharply in recent years after a 1940-1950 peak as seen in Table 7. The concentration of newspaper interest has a double peak because (1) in 1940 AM channels then thought technically and economically available were dwindling fast and newspapers had moved into radio heavily in the 1930s so as not to be left out in the technological change in news reporting methods, and (2) in 1950 many of the early FM and TV outlets came under control (especially of those paper with controlling interest in AM stations) for the same reason—to protect themselves against technological change. Newspapers seem to have been especially active in markets 26 and below as is seen in the following table:

Table 7: Newspaper Control of Broadcast Outlets

Market Group	1922	1930	1940	1950	1960	1967
Top 10	.04	.07	.16	.18	.09	.06
Top 25	.08	.11	.21	.20	.08	.07
Top 50	.12	.07	.21	.21	.09	.07
Top 100	.09	.07	.23	.21	.11	.07

Source: Appendix Table C-1.

12. The rate of decline of newspaper-controlled broadcasting voices has been even more pronounced, so that by 1967, the press was a very minor ownership category in broadcasting as is seen in the following table:

Table 8: Newspaper Control of Broadcast Voices

Market Group	1922	1930	1940	1950	1960	1967
Top 10	.09	.07	.17	.15	.07	.04
Top 25	.09	.10	.21	.21	.06	.04
Top 50	.06	.07	.21	.19	.06	.04
Top 100	.05	.07	.23	.19	.08	.05

Source: Appendix Table B-1.

With the obvious exception that the actual numbers are smaller, the pattern and rate of decline is similar to that of newspaper-controlled outlets.

13. As is seen in Table 9, the proportion of group and conglomerate control of broadcasting outlets has increased in recent years after an earlier peak:

Table 9: Group-Conglomerate Control of Broadcast Outlets

Market Group	1922	1930	1940	1950	1960	1967
Top 10	.16	.17	.40	.25	.35	.40
Top 25	.10	.11	.40	.19	.32	.37
Top 50	.05	.10	.45	.17	.31	.36
Top 100	.02	.06	.39	.14	.29	.33

Source: Appendix Table C-1.

The initial 1940 peak in group owners is explained by the height of pre-war AM competition among networks and other groups trying to get solid positions in radio before all available channels were gone—a position very much like that faced by newspaper owners (see paragraphs 11 and 12 above). The decline in 1950 is harder to explain—it was likely due to the new services (especially FM) which many groups were not eager to enter at first. Since 1950, however, group-conglomerate control of radio-TV outlets has increased in all market groups by a factor approaching two in the smaller markets. Noting overali proportions, however, it is clear that unlike newspaper owners, groups and conglomerates prefer the larger markets.

14. The following table shows the increase in group and conglomerate control of broadcast voices on a pattern much like that just described:

Table 10: Group-Conglomerate Control of Broadcast Voices

Market Group	1922	1930	1940	1950	1960	1967
Top 10	.15	.15	.37	.18	.29	.32
Top 25	.09	.09	.39	.15	.27	.30
Top 50	.04	.09	.42	.14	.27	.31
Top 100	.05	.07	.41	.12	.25	.30

Source: Appendix Table B-1.

We see here that groups and conglomerates account for a third of all owners in the top 100 markets, and that the position of groups and conglomerates has increased by a factor of two in all market groups except the top 10.

For discussion of the 1940 peak and 1950 decline, see paragraph 13 (just above). A word of caution is advised here: the FCC proposed rule-making will not directly affect this particular ownership group. Many of these groups and conglomerates control only one station in a market—but they have outlets in many different markets. Only those groups with more than one full-time station in any given market would be affected by the rule-making, and it is likely that forced to sell in one market will encourage them to buy a single station in another—thus expanding the group's influence, but in a different area.

15. As is seen in the following figures, there is little doubt that AM-FM combinations have been of far greater importance numerically in the top 100 markets than have radio-TV combinations:

Table 11: Growth of Broadcast Voice Combinations

	1950		1960		1967	
Market Group	AM-FM	R-TV	AM-FM	R-TV	AM-FM	R-TV
Top 10	66	26	72	37	86	46
Top 25	100	44	113	75	155	78
Top 50	153	65	159	130	238	134
Top 100	228	84	215	218	356	215

Source: Appendix Table B-1.

In 1950, because television was slower to develop initially than was FM (because of the four-year freeze on TV applications and the greater costs involved with television), AM-FM combinations outnumbered radio-TV combinations by more than two to one in all market groups. TV growth by 1960 had narrowed the gap somewhat (because FM had declined through most

of the 1950s), but FM growth in the 1960s widened the gap again by 1967.

D. Media and Population Growth

16. Media outlets have increased at a faster rate than population as is seen in the figures in the following table which shows the number of media outlets available per 1000 people in each market group. Larger figures indicate more outlets per 1000 people.

Table 12: Media Outlets Per 1000 Population

Market Group	1920	1930	1940	1950	1960	1967
Top 10	.018	.014	.011	.016	.018	.019
Top 25	.024	.016	.013	.018	.022	.022
Top 50	.026	.018	.016	.024	.028	.029
Top 100	.028	.021	.020	.031	.036	.040

Source: Appendix Table A-1.

A familiar pattern repeats itself here—the rapid filling up of then-available AM channels led to a decline in outlets-per-thousand by 1940 while the opening up of new FM and TV services after the war has lead to steadily increasing numbers of outlets rising faster than population increases. The rate of growth has slowed considerably, by the 1960s however, as available channels are technically and/or economically filled up. It is likely that by the early 1970s—if not by 1970—that these outlet-per-thousand figures will turn down again for the first time since 1940.

17. Media voices have also increased faster than population growth as is seen in the figures in the following table which show the number of voices-per-thousand population:

Table 13: Media Voices Per 1000 Population

Market Group	1920	1930	1940	1950	1960	1967
Top 10	.017	.012	.010	.011	.013	.014
Top 25	.022	.014	.011	.012	.015	.016
Top 50	.026	.013	.014	.016	.020	.021
Top 100	.027	.017	.017	.020	.025	.028

Source: Appendix Table A-1.

Clearly, the multiplicity of media voices has increased at a faster rate than population growth in the top 100 SMSAs—a healthy trend. The rate of voice-per-thousand increase has been highest in the smaller markets.

Conclusions

From the information presented on the previous pages, it would appear that the FCC proposed rule making is ill-advised, at least at this time. Past trends in market media concentration do not suggest the need for such a ruling, and in many cases show the normal practices of business competition are accomplishing the same thing . . . diversification of media voices.

Inherent in this report, however, is a warning addressed primarily to the Commission. As can be seen

in several of the results above, as long as there were channels which could be utilized technically *and* economically, the broadcast medium expanded and continued to diversify. When those channels became scare, however (as in 1940 and in the early 1970s), monopoly ownership within and between markets became an increasingly stronger factor in the industry. The lesson to be noted is easy to state and hard to act on—as long as sufficient channels can be made available for expansion of service, monopoly within markets should not become a problem in broadcasting Defining "sufficient channels" is beyond the scope of this report but logically it would mean a few available channels in each service in each area. Once the technical limits of existing services have been reached, this safety cushion is obviously lost, leaving two possibilities: (1) initiation of new media services to allow new voices to enter each market, or (2) rulings to artificially enforce diversification *if* such diversification is proved to be necessary to the medium's well-being, and *if* such diversification is not forthcoming from the industry itself. Under possibility two, the two "if" clauses are of critical importance. This report has shown that thus far diversification *has* been developed within the industry as far as in-market voices are concerned. Proof of the good effect of a diversification policy instituted by government, however, will be a good deal more difficult to accomplish, because of the need to show its necessity to the medium's well-being and service.

As this study has dealt in detail with broadcasting, specific recommendations concerning newspapers are not included. Suffice it to say here that the minor role newspapers are playing in broadcasting today would seem itself to obviate any need for prevention of their

ownership of broadcast stations. The importance of their role in radio-TV has declined so far in recent years that their right to have a broadcast license as much as anyone else should far outweigh any policy to the contrary.

Finally, it must be remembered that media voices means just that—*all* media and not just broadcasting or newspapers. This study has reported on only part of all the media available in each of these markets. Even in that part (all daily mass media originating within the SMSA) however, there is a clear multiplicity of voices to be heard giving news and entertainment each day. When you add in other media originating within most of these SMSAs plus the many media received in but not originating in each market, the variety of voices and points of view heard is almost numberless.

[Robbins, "A Study of Pioneer AM Radio Stations and Pioneer Television Stations," (April 1971) (NAB Exhibit D), pp. 1-21]

TABLE OF CONTENTS

SECTION Page

I. THE PROJECT . . . . . .
Impetus For The Project . . . . . .
Objectives Of The Project . . . . . .
Scope Of The Project . . . . . .
II. SOURCES OF MATERIALS . . . . . .
III. METHODOLOGY . . . . . .
IV. THE FINDINGS . . . . . .
V. ACKNOWLEDGEMENTS . . . . . .

I. THE PROJECT

Impetus For The Project. During the summer of 1970 the National Association of Broadcasters realized a need for historical data on the affiliation between broadcasting stations and newspapers. The researcher who writes this report was known to have lived through and to have participated in the early years of broadcasting in the United States and since that time to have engaged in the training of broadcasters and in teaching the history of that industry. He welcomed the opportunity to assemble the desired information from the government files. As a consequence, the study on which this report is based was initiated.

Objectives Of The Project. The desire to obtain the factual record of newspaper participation in American broadcasting gave the impetus to this study. However, it was soon realized that the history of newspaper participation in the industry became meaningful only when that information was viewed in its relationship to the history of all other broadcasting ownership interests. In other words, newspaper affiliated stations should not be lifted out of context for scrutiny but must be studied within the frame work of the total broadcasting picture if conclusions of significance are to be reached. Thus, the objectives of this study were to determine: (1) the business and/or social affiliations of the licensee who originated each broadcasting facility and (2) the changes of such affiliations as the actual ownership - not necessarily the licensee name - changed through the years.

Since the United States broadcasting system consists of two types of transmission, radio and television, this present study traces the actual and affiliated ownership patterns of television as well as those of AM radio stations.

Scope Of The Project. The National Association of Broadcasters had a deadline to meet in utilizing the materials that were to be forthcoming from the study. The researcher had a predetermined, limited amount of time to spend in Washington searching the records. These two time considerations dictated the final scope of the project.

It was decided that histories of the pioneer radio and television stations would yield the most valuable information and that this study should be limited to a consideration of the ownership patterns as they developed with these original stations. Pioneer radio

stations were defined as all stations which went on the air prior to 1935 - those stations which were authorized before the Federal Communications Commission was put into operation. Pioneer television stations were defined as those which went on the air, or which were authorized, prior to the Federal Communications Commission's 1948 freeze on the activation of television channels.

The ownership of the pioneer radio stations was traced from the date of origination to 1950-51, a span of from twenty to thirty years, or a period roughly comparable to the entire life span of the pioneer television stations. Although it had been the original intent to carry the search of the radio station files up to 1970, the unrelenting deadline forced the search to be halted at 1951. The histories of the pioneer television stations were traced from their origination dates to 1970.

II. SOURCES OF MATERIALS

Practically all of the data on the pioneer radio stations was taken from the records of the Department of Commerce, the Federal Radio Commission and the Federal Communications Commission which are stored in the Federal Records Center at Suitland, Maryland. Some of the information also came from the 1970 BROADCASTING *Yearbook*. The data for the pioneer television stations was gathered from the active Federal Communications Commission files in Washington, the inactive files in the Federal Records Center in Maryland and a brief history of pioneer television stations published in the November 2, 1970 issue of BROADCASTING.

III. METHODOLOGY

The research procedures and organizational plan of this study evolved slowly over a period of more than two months. They were dictated by the accessibility of the federal records and the system under which those records are stored.

It was initially believed that all of the ownership information would be almost instantaneously available in the Reference room of the Federal Communications Commission in Washington. The records in that reference room do reveal licensee names but they do not reveal the ownership of corporate licensees. This information up to 1961 is to be found only in the inactive, stored files of the Federal Communications Commission. So the determination was made to study these files - a set of folios for each station containing the CP and license applications, correspondence, engineering data, inspector's notations, etc. - in order to discover the actual individual(s) or organizations - not legal entities - who owned and were licensed to operate a broadcasting facility on any given date.

In many cases even the files did not readily yield the desired information. The early government regulatory agencies - the Department of Commerce and the Federal Radio Commission - did not insist that applicants indicate their regular business interests. Innumerable applicants were amazingly casual about the manner in which they answered application questions. It was found that applications frequently were missing from folios. Consequently, the information sought was sometimes found in correspondence, in reports on FCC and FRC hearings, even on the letterheads of the correspondence.

It was erroneously assumed that the complete files for each station from origination to 1970 could be examined in the reference room of the Federal Communications Commission in Washington. However, the records for each subject radio station consists of a minimum of six, possibly as many as seven or eight folios, some as much as three inches thick. With over six hundred radio broadcasting stations under consideration, not to mention the one hundred plus television stations, it would have been necessary to transport to Washington from the Suitland, Maryland, Records Center a minimum of three thousand separate folios. Obviously, this procedure was not feasible and it so became apparent as the researcher waited for more than six weeks for files to be delivered to the Washington reference room. Only a comparatively small number of about forty out of the more than four hundred complete files for which call orders were placed in the early stages of the investigations arrived at the FCC reference room from the Maryland Records Center. Therefore, when authorization was proffered him to conduct his research at the Federal Records Center in Suitland, he accepted with alacrity.

The researcher's wife joined him when the move to Suitland was made. For several weeks the two worked in the search room of the Records Center where folios were brought to them from the stacks. Eventually they were accorded the privilege of working in the stacks. This proved to be a major milestone in the project.

Access to the stacks enables one to comprehend the complex system which has been developed for effectively storing and keeping track of literally millions of government records. It is only when one understands this system that an effective search plan can be

designed, one which is practical and efficient in terms of the shelving, reshelving, and transporting involved.

It was learned that station files are shelved in the Record Center according to dates, not call letters. Thus, the six to eight folios which comprise the complete file for any given station are not shelved together. Rather the folios of all stations which contain materials covering a given period of years are boxed and shelved together. This grouping is technically known as an accession. For example, all the files of the Commerce Department and the subsequent ones of the Federal Radio Commission covering the years up through 1934 are packed away in sixty-three cardboard boxes catalogued as Accession Number 54-A-145. The period of 1934 to 1961 is divided into four eras - or accessions - each stored in a different area of the one acre stack room in the Records Center.

It appeared that the speediest and most direct means of examining the files was to search the folio(s) for every station under consideration contained in one accession and then move on to the next and then to the next. If the folios of each station were to be pulled in chronological order, as they had previously been, an appreciably greater amount of time and effort would go into the pulling alone. So it was decided to adopt the accession plan of searching the files. The obvious drawback to this method was the formidable task of assembling into a chronological continuum notes which were taken piecemeal and days or weeks apart. Especially was this true when a folio in one of the accessions was lost or checked out, and there were resultantly no notes for that span of years. As of this writing, with the advantage of hindsight, the researcher is uncertain which method of studying the files - by

accession or chronologically by stations - would actually have been speedier.

Searching by accession did make it possible to trace the ownership histories of all stations uniformly, discontinuing the search at whatever date time demanded without affecting the validity of the sample. A chronological search pattern would not have provided such flexibility in the span of years covered, but would have necessitated narrowing the number of stations studied.

The first accession containing the original folios of stations that went on the air through 1934 provided the basic list of radio stations for this project. Occasionally FRC-FCC hearing reports and station applications revealed information on early stations whose folios were missing. These latter were added to the basic list of stations whose histories were to be traced.

The researching of the ownerships of the pioneer television stations was simple as compared with the researching for the ownerships of the pioneer AM radio stations. The histories of these pioneer telecasting stations as set forth in the November 2, 1970 issue of BROADCASTING were checked against the folios of these same stations in the inactive files at the Federal Records Center in Maryland and in the active files in the reference room of the Federal Communications Commission in Washington.

With these television stations only the newspaper and radio affiliations were specifically traced. No attempt was made to determine businesses, other than newspaper publishing and broadcasting, in which the licensee might be engaged. There was not the diversity of individuals, businesses and "societies" involved that

there had been with the development of radio broadcasting. Television is a costly enterprise. It could not be undertaken as a whim, a hobby or a speculative adjunct of a prospering business. The tables that will be found in the FINDINGS section of this report indicate the information that was sought in reviewing the files of the pioneer television stations.

IV. THE FINDINGS

As has been explained earlier one of the prime goals of this project was to ascertain the commercial and/or social organizations which, in the pre-FCC years, were moved to experiment with the use of radio broadcasting or the "radiophone" as it was first known. It is obvious that there is a natural affinity between broadcasting and certain types of business enterprises; newspaper publishing, for instance. But actually, who nurtured these early radio stations through their fledgling years? As broadcasting developed, did the type of licensee change? Did the ownership tend to remain more constant among certain types of licensees? Or in certain parts of the country? The data gathered in this project has been tabulated in such fashion as to lend itself to analysis in answering these questions and others. But the researchers have made no effort to interpret the collected data.

One generalization is justified. Many a pioneer licensee who ventured into radio broadcasting as an advertising adjunct to his primary business, eventually abandoned that business in favor of becoming a full-time broadcaster. Many of the names which appear on construction permit and license applications through the years, first in one locale and then in another,

identify individuals whose first radio broadcasting venture was for the purpose of publicizing activities so diverse as a real estate development, a threatre, a church, a creamery, a newspaper, – even a national guard unit.

In the process of preparing Table II, it was necessary to decide how to compute this changing ownership. When should a station be reclassified from *hotel, music store, minister,* etc. to *broadcasting company*? It was decided by the researchers that, even though no actual change of ownership had taken place, when the original licensee applied for a license renewal after 1930 under a corporate name different from that of the original licensee, the station should be credited to *broadcasting company* rather than to the originating category.

There was one exception to the above rule. The researchers were especially interested in newspaper ownerships of stations. Hence, when a station had any affiliation whatsoever with a newspaper, that station was credited to *newspapers* in the tabulations.

In some instances a radio station was launched and maintained through the efforts of two disassociated organizations. For instance, in New Orleans the license of WSMB during the period through 1951 was issued jointly to a department store and a theatre organization. In such cases the subject station has been credited to two categories in Tables I and II. The WSMB example is, of course, exceptional. More often one of the originating businesses dropped out of the operation. Also some comparatively few stations, as the Industry developed, were combined, abandoned, or deleted. Due to these circumstances, it should be understood that the totals of the various categories cannot be reconciled with the total number of stations under consideration.

In Table I the original ownership of the pioneer radio stations has been matched with sixteen types of commercial or social ventures. In Table II subsequent ownership in the years 1927, 1934, 1945 and 1951 has been categorized in the same fashion. In order that the reader may utilize the tables in a meaningful manner the categories as defined by the tabulations are here presented:

Newspapers:

Newspaper publishing company under corporate name owning all or part of the broadcasting operation.

Stockholder of publishing company owning all or any stock of broadcasting operation and serving on board of directors of broadcasting operation.

Individuals:

An individual, a partnership of two individuals, a family corporation where approximately 90% or more of the stock held by the same family over a period of years. In other words, an individual enterprise, as opposed to a group investment.

Educational Institutions and Organizations:

Educational institution or instructional organization of any kind:

Colleges and universities
Public schools
Specialized educational ventures such as:
Institutes for training broadcasting technicians.
Academy of dance.

Radio Receiver Sales and Service:

Retail establishment that sells-services radio receivers:

Radio receivers may be sole business.
Principal business may be music, furniture, hardware, with radio receivers as one of items for sale.

Electrical Services and Supplies:

Electrical Equipment manufacturers:
General Electric, Westinghouse, Grebe, etc.
Electrical contractors
Battery manufacturers, suppliers, servicers:
Willard, National, etc.
Automobile services.

Religious Organizations - Individuals:

Churches, Bible classes, ministers, etc.

Educational institutions supported by religious organizations not included. Such educational institutions are placed in the *Educational* category

Broadcasting Companies:

Any group of people, incorporated or unincorporated, who have pooled their resources, sometimes their efforts, for the purpose of operating a broadcasting station.

Department Stores and Automobile Dealers:

Self-explanatory.

Advertising Agencies - Amusement Organizations:

Advertising agencies: self-explanatory
Amusement Organizations: Theatre and Amusement Park Operators, Talent Booking Agencies, Film Distributors.

Hotels:

Self-explanatory.

Utility Companies:

Telephone Companies, Electric Power Companies.

Agriculture:

Seed and nursery companies, hatcheries, grain exchange, etc.

One agriculturally oriented type of business was excluded from this category and credited to *newspapers,* i.e., farm journals and newspapers.

Fraternal - Civic Organizations:

Lodges: Moose, Elks, etc.
Chambers of Commerce, Radio Clubs, Political Party.

Medical-Health Organizations/Individuals:

Hospitals, Medical Doctors, Opticians, Osteopaths, Chiropractors

Government Agencies:

Municipalities
National Guard units

Insurance Companies:

Self-explanatory.

Miscellaneous:

Mostly one of a kind - never more than three.
For instance:
A bakery
A creamery
A playing card company
A tobacco company
A woolen mill
2 flour mills
3 oil companies

AM RADIO STATIONS ORIGINATED BETWEEN 1920 AND 1934 BY YEAR OF LICENSING AND BY CATEGORY OF LICENSEE

CATEGORY	Number of Stations Originated In: 1920	'21	'22	'23	'24	'25	'26	'27	'28	'29	'30	'31	'32	'33	'34	Total all years
Newspapers		1	21	5	2	1	3	2	1	2	1			1	2	42
Individuals	1	1	17	3	12	18	21	17	7	7	3	3	4	2	3	119
No business nor occupation indicated in files.																
Educational Institutions and *Organizations*			31	9	3	5	2	2	1							53
Radio Receiver Sales and *Service*			12	1	8	5	9	9	2	1	3	2		1		59
Electrical Services and *Supplies* Independent of radio receiver merchants	1	1	15	6	4	13	11	3	1	1				1		58
Religious – Organizations – Individuals – Excluding educational institutions			5	5	7	9	5	1	1				1		1	38
Broadcasting Companies			3		2	1	7	1	3	3		2	2	1	3	34
Department Stores and *Automobile Dealers*			12	2	3	7	3								1	28
Adversting Agencies – Including Amusement Organizations			1	2	1	6	1	1			1					16
Hotels					3	5	3				1					12
Utility Companies		1	5	1	2		3									12
Electric Power-Telephones																
Agriculture – Organizations or businesses associated with			2	1	2	3	1									11
Fraternal – Civic Organizations			2		2	3	3									10
Medical-Health Orgs/Indivs.			1	2	1	1	2	1								8
Government Agencies					2	1	2									5
Insurance Companies				1	1	2				1						5
Miscellaneous		1	4	1	3	10	1	3	2	1	2					28
TOTALS	2	3	131	42	58	95	80	47	18	19	11	7	7	6	10	526

AM RADIO STATIONS ORIGINATED PRIOR TO 1935 BY OWNERSHIP CATEGORIES IN YEARS 1927, 1934, 1945, 1951

Category	1927	1934	1945	1951
Newspapers	43	95	141	138
Individuals	61	100	87	84
No business nor occupation indicated in files.				
Radio Receiver Sales and *Service*	20	14	4	3
Electrical Services and *Supplies* Independent of radio receiver merchants	41	17	7	6
Educational Institutions and *Organizations*	49	33	29	32
Religious – Organizations and *Individuals*	27	14	9	8
Excluding educational institutions				
Broadcasting Companies	39	161	141	144
Department Stores and *Automobile Dealers*	18	7	8	6
Advertising Agencies – Including Amusement Organizations	8	9	8	2
Hotels	12	6	2	1
Utility Companies – Electric Power and Telephones	8	3	1	—
Agriculture – Organizations or businesses associated with	5	5	—	—
Fraternal and *Civic Organizations*	10	1	1	2
Medical-Health Organizations/				
Individuals	8	1	1	1
Government Agencies	8	6	5	5
Insurance Companies	5	9	8	8
Miscellaneous	14	8	4	4

CONTINUITY IN OWNERSHIP OF PIONEER AM RADIO STATIONS

Of 638 pioneer AM Radio Stations - stations originated between 1920 and 1934:

A. Number of original licensees still operating those facilities in 1951: *107*

B. Number of licensees who owned-operated stations for 20 consecutive years or more during the period 1920 to 1951: *182*

The licensees in *B* fall into three categories:

1. Licensees who purchased stations already on the air and who continued to operate these purchased stations for 20 consecutive years or more.
2. Initial licensees-operators who operated their stations for 20 consecutive years - or more - but who relinquished the licensees for their stations prior to 1951.
3. Original licensees who continued to operate their stations through 1951. Hence, the 107 licensees in *A* above are a part of the 182 in *B*.

INVOLVEMENT OF NEWSPAPERS IN AM RADIO STATION PIONEERING

Of 638 pioneer AM Radio Stations during period 1920 to 1934:

A. *Number of newspapers putting stations on the air:* *40*

B. *Number of newspapers maintaining their radio interests through 1951:* *27*

C. *Number of newspapers relinquishing their interest:* *13*

2 in less than 1 year
4 after 3 years
2 after 4 years
1 after 5 years
1 after 6 years
1 after 13 years
2 after 22 years

D. *Number of newspapers purchasing interests in operating radio stations:* *178*

In stations less than 1 year old:	12
In stations 1 to 5 years old:	33
In stations over 5 years old:	133

E. *Of the 178 newspapers which purchased interests in operating stations, number relinquishing interests:* *38*

After 1 year of ownership:	1
After 2 years of ownership:	5
After 3 years of ownership:	3
After 4 years of ownership:	3
After 5 years of ownership:	4
After 6 years of ownership:	4
After 7 years of ownership:	2
After 8 years of ownership:	4
After 9 years of ownership:	3
After 10 years of ownership:	1
After 11 years of ownership:	1
After 12 years of ownership:	1
After 13 years of ownership:	3
After 14 years of ownership:	1

After 15 years of ownership: 1
After 19 years of ownership: 1

F. *Number of newspapers interested in radio stations whether interest was (1) through origination or through (2) purchase:* . . . *218*

OWNERSHIP PATTERNS OF PIONEER TELEVISION STATIONS

The following tables are based on the pioneer television stations, those that had been put in operation - or which had construction permits - prior to the Federal Communications Commission's freeze on the activation of channels, 1948-1952.

Pioneer Television Stations: *106*

Originated By:

A. *Newspapers with no experience in operating broadcasting facilities:* *3*

B. *Newspapers with experience in operating broadcasting facilities:* *29*

C. *Broadcasting operations, ordinarily AM radio stations:* *57*

D. *Organizations - or indivduals - with no experience in broadcasting and with no connection with newspapers:* *17*

Number of operations which changed ownership during period from origination date to 1970: *43*

A. *Number of stations that changed hands during:*

First *5 years* on the air – *25* stations
5 to 15 years on the air – *15* stations
15 to 20 years on the air – *3* stations

B. *Numbers of times stations changed hands:*

1 ownership change – 25 stations
2 ownership changes – 10 stations
3 ownership changes – 7 stations
4 ownership changes – 1 station

Of the 32 newspaper originated stations:

Number of operations which changed ownership during period from origination date to 1970: *6*

Number of Times stations changed hands:

1 ownership change – 2 stations
2 ownership changes – 1 station
3 ownership changes – 3 stations

Of the 74 originated stations not connected with newspapers:

Number of operations which changed ownership during period from origination date to 1970: *36*

Number of times stations changed hands:

1 ownership change – 23 stations
2 ownership changes – 8 stations
3 ownership changes – 4 stations
4 ownership changes – 1 station

COMPARATIVE LICENSE RELINQUISHMENT RATIOS

Relinquishment Rate	FOR:
	NEWSPAPER ORIGINATED STATIONS 32
18 3/4%	6 newspapers relinquished original license by 1970
	26 newspapers still held original license in 1970
	NON-NEWSPAPER ORIGINATED STATIONS 74
	***Originated by Broadcasters* 57**
38 2/3%	22 had relinquished original license by 1970
	35 continued to hold original license in 1970
	***Originated by Independent Enterprises:* 17**
82 1/3%	14 had relinquished original license by 1970
	3 continued on original license in 1970
	All Non-Newspaper Originated Stations
58 2/3%	36 non-newspaper stations had relinquished original license by 1970
	38 non-newspaper stations continued to hold original license in 1970.

[Comments of ANPA (April 2, 1971), pp. 54-58]

VI.

THE COMMISSION'S ASSERTED OBJECTIVES OF PROMOTING DIVERSIFICATION OF VIEWPOINTS AND ECONOMIC COMPETITION IN LOCAL MARKETS CAN BEST BE ACHIEVED ON AN *AD HOC* BASIS

As seen in the preceding section, the Commission's proposed rule would, in effect, sacrifice stable, well-operated stations owned by newspapers with close community ties in return for highly speculative and at best nominal increases in diversity in specific local markets. Affirmative public interest disadvantages of the proposed rule include substantial risks to continued local ownership of broadcast stations. Furthermore, problems of concentration of control on a nationwide basis, as well as conglomerate and absentee ownership of broadcast stations, would undoubtedly become more serious if the Commission's divestiture requirement were approved.

ANPA is convinced that diversity of viewpoints and economic competition in local markets can be better achieved through means less drastic than the extreme and unrealistic measures proposed by the Commission. And, since these means are less restrictive of First Amendment rights and less likely to frustrate achievement of other important communications policies, constitutional principles, as well as the public interest, demand that the Commission abandon the proposed rule.

A. The Commission Should Continue to Apply Its Present Policy of Considering Newspaper Applications for Broadcast Stations on an *Ad Hoc* Basis

As amply demonstrated in the preceding section, the primary defect of the Commission's proposed rule is its failure to take into account the variable and often unique conditions prevailing in individual local markets. No two broadcast or newspaper markets in the United States are identical. Each market has its own distinct geographical, social, and economic characteristics, and any attempt by the Commission to fashion a rule of general applicability in an area so peculiarly dependent on the facts of each situation is foredoomed to failure. It is for this reason that the Commission has traditionally considered newspaper ownership as only one factor among many in determining whether to grant a broadcast application. The most authoritative statement of that policy is found in the Public Notice terminating the 1941 newspaper investigation. There, the Commission said:

> "All the Commissioners agree to the general principle that diversification of control of such media is desirable. The Commission does not desire to discourage legally qualified persons from applying for licenses, but does desire to encourage the maximum number of qualified persons to enter the field of mass communications, and to permit them to use all modern inventions and improvements in the art to insure good public service.
>
> "In the processing of individual applications for licenses, the Commission will inquire into and in its decisions give expression to 'public interest' considerations. The Commission does not feel that it should deny a license merely because the applicant is engaged or interested in a particular type of business. However, it does not intend in granting licenses in the public interest to permit concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee." Memorandum F, Attachment B.

Continuously since the above statement, the Commission has vigorously applied its diversification policy in individual licensing proceedings involving newspaper applicants. In numerous comparative hearings the Commission has awarded station licenses to the non-newspaper applicant;[40] and even in non-comparative proceedings, the Commission has denied applications of newspaper owners where anti-competitive conditions or practices were established after a hearing.[41] Similarly, the Commission has regularly considered any apparent problems of concentration and diversification prior to approving assignment and transfer applications.[42] And, in cases of alleged abuses resulting from newspaper ownership of local broadcast stations, the Commission has at times chosen to test the

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[40] *See, Southern Tier Radio Service, Inc.*, 3 R.R. 211 (1946); *Observer Radio Co.*, 3 R.R. 234 (1946); *Voice of Augusta, Inc.*, 3 R.R. 590 (1946); *WBNX Broadcasting Co., Inc.*, 4 R.R. 205 (1948); *Scripps-Howard Radio, Inc.*, 4 R.R. 525 (1948), *aff'd, Scripps-Howard Radio, Inc. v FCC*, 189 F.2d 677, *cert. denied*, 342 U.S. 830 (1951); *McClatchy Broadcasting Co.*, 9 R.R. 1190 (1954), *aff'd, McClatchy Broadcasting Co. v FCC*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957).

[41] *Fostoria Broadcasting Co.*, 3 R.R. 2014a, *aff'd sub. nom., Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950).

[42] *Grants Broadcasting Co., Inc.*, 3 R.R. 2d 657 (1964); *cf. Times Herald Printing Co.*, 19 R.R. 2d (1970).

validity of such allegations in an evidentiary hearing on license renewal.[43]

In summary, by recognizing the unique characteristics prevailing in each local market, the flexible procedures previously followed by the Commission have been ideally designed to serve the public interest. There is nothing in the record of this proceeding demonstrating the need to abandon this well-established policy of considering newspaper ownership on a case-to-case basis. Neither the Commission nor the Antitrust Division has pointed to the existence of the sorts of abuses which they allege may potentially arise in newspaper cross-ownership of broadcast stations. *See e.g., Times Herald Printing Co.*, 19 R.R. 2d 169, 178j-178p (Commissioner Johnson dissenting). In the absence of such a showing, the Commission should continue to consider any specific questions raised by newspaper ownership of broadcast stations on an *ad hoc* basis.

B. The Commission and the Antitrust Division Possess Additional Regulatory Tools Well Adapted to Achieve Diversification and Economic Competition in the Local Markets

The Antitrust Division and the Commission both possess important means of supplementing the FCC's present policy of considering the effect of newspaper ownership of broadcast stations on an *ad hoc* basis. ANPA believes that these means are better designed to promote competition and diversification than the Commission's proposed anti-newspaper rule.

The first of these regulatory tools is the Justice Department's authority to enforce the antitrust laws. We do not assert that newspaper-broadcast combinations have *never* engaged in practices questionable under

antitrust statutes. In such cases, however, the Justice Department is not powerless to act, and in fact has acted. *See e.g., Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). Espicially in light of the availability of these remedies, ANPA submits that the Commission's proposed rule, which would punish both guilty and innocent without distinction, is inconsistent with the underlying policies of the antitrust laws. *Cf. United States v. Radio Corporation of America*, 358 U.S. 334, 351-52 (1959).

Similarly, the Commission itself is well equipped to guarantee diversity of media voices in the local market by remedies other than the radical surgery proposed in this proceeding. Now, more than ever before, stations are obligated to present all responsible views on matters of public concern. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Furthermore, as a recently published memorandum to the Commission from its General Counsel suggests, the full limits of the fairness doctrine following the *Red Lion* decision have yet to be tested.[44] Until it is clearly demonstrated that the

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[43] *Chronicle Broadcasting Co.*, 15 R.R. 2d 993 (1969); *Midwest Radio-Television, Inc.*, 16 FCC 2d 943 (1969).

[44] Mr. Geller suggests that the Supreme Court's opinion may permit the Commission, pursuant to Sections 303(b), 303(r), 307 and 309, to specify minimum percentages of time devoted to various programming categories. Furthermore, he notes that stations may have a duty to respond not only to complaints of unfairness but also to seek out, encourage and implement the expression of contrasting viewpoints and that this duty, as part of the requirement that a licensee operate in the public interest, could provide the basis for license revocation or a cease and desist proceeding (as distinguished from a license renewal hearing). Recent rule makings actions by the Commission indicate its intent to explore these recommendations in depth. *See Notice of Inquiry* and *Notice of Proposed Rule Making*, FCC Docket 19153, February 23, 1971.

fairness doctrine is an inefficacious means of guaranteeing diversity of programming in local markets, the Commission should abstain from attempting a basic restructuring of the broadcast industry.

Finally, the potential for assuring diversity in local markets inherent in the fairness doctrine can be significantly supplemented in numerous ways through the Commission's authority to promote the growth of CATV, communications satellites, and other emerging new modes of communications which hold out the distinct promise of ending forever any "scarcity" of channels of electronic communication. In contrast to broadcasting outlets, CATV systems by their very nature are "diversified" in terms of the services they provide or are capable of providing. At the present time, all such systems carry a number of television stations over whose programming they exercise no control. Upon resolution of the distant signal controversy, they will be able to provide even more television "voices." CATV also has the capability to present a wide variety of informational and entertainment services originating within the system. Twenty channels of CATV service are already a reality, and it has been said that 100-channel systems are in the future. CATV cannot, therefore, be considered a single "voice" in the sense that a radio or television station is. More accurately, it is a conduit for many "voices." By fully exploiting the capabilities of this new medium, optimal diversity in local markets can readily be achieved.

[Comments of the Houston Post Company, et al. (May 17, 1971), pp. 16-25]

THE SEPARATE OPERATION OF THE NEWSPAPER AND BROADCAST STATIONS

31. Nor is the Commission's assumption that increased diversity will automatically be obtained by a divorce of commonly owned broadcast stations and newspapers well founded in this case. The fact is that, in Houston, the KPRC stations and the Post do function as separate entities providing diverse voices that serve the public well. The operation of the stations and the newspaper are completely separate and there is no overlap of operational functions between the newspaper and the stations.[13] The stations are run by broadcasters who have separate operational authority. The newspapers are run by newspapermen who have separate operational authority. The newspapers and the stations function from separate offices and have separate staffs.[14]

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[13] Attachments 3 and 4 are diagrams of the operational personnel and their functions for KPRC and KPRC-TV. They detail the separate functions performed by individual staff members of the two stations and indicate that, for the two stations, there are separate news, sales promotion, public service, programming and engineering departments.

[14] The separation is illustrated by the fact that any advertising for the newspapers carried on the stations is at regular rate card rates. The newspapers sell advertising space to the station at regular rates and both stations' programming announcements are carried with no favoritism being shown. There is no identification with the Post in the stations' announcements and no identification of the stations with the Post in the papers' program announcements. Attachment 5 is the summary and conclusions of a study undertaken by Dr. William Hawes, an

[footnote continued]

32. The duties and functions of professional broadcasters and professional newspapermen are quite different.[15] Different experience and training involved creates a natural (if somewhat competitive) separation between the two professions. For example, the top operational personnel of the stations have extensive broadcast experience, and broadcast experience only. The operational personnel of the newpaper has newspaper experience and newspaper experience only. The total operational separation of the newspaper and stations does result in diversity of viewpoint and different treatment of matters of public concern. For example, development of editorials are the responsibility of the respective managements of the newspapers and stations. This can and does result in different

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associate professor of communications (radio-television-film) at the University of Houston. The study, "A Content Analysis of the Television-Radio Page and TV Week Magazine of the Houston Post," was undertaken "to determine whether the television and radio content of the Houston Post is objective in commenting on television and radio programs." Dr. Hawes' conclusion was "that for the sample periods the Houston Post showed no significant partiality toward KPRC Television or KPRC Radio or the National Broadcasting Company with which they are affiliated. The Television-Radio Page was remarkably objective . . . and TV Week was fair even to rotation of its cover page." The study's summary and conclusions are being submitted with all copies of these comments. However, because of its bulk, a single copy of the underlining data analyzed by Dr. Hawes accompanies the original copy only.

[15]The Commission's conclusion (Notice, para. 32) that "[t]he functions of newspaper and television stations as journalists are so similar that their joint ownership is, in this respect, essentially the same as joint ownership of two television stations" is simply untrue. The study by Professor Wilcox (Comments of the American Newspaper Publishers Association, Volume II, Item C) illustrates clearly the difference of function of broadcast and newspaper journalism.

perspectives as in illustrated by recent editorials on the stations and in the Post. Attachment 6 is a sampling of editorial positions taken by the stations and by the Post and a sampling of editorial positions taken by the stations on which the Post took no position. They clearly indicate an independence of viewpoint.

33. It must, however, be recognized that while broadcast editorializing does contribute to diversity of viewpoint, broadcasters are not free, as are newspapers, to present only their views. The Commission's licensees are obligated to present opposing views each time they take a position on controversial matters. Nor does the assumption upon which the proposed rules rest (*i.e.*, that contrasting viewpoints will automatically result from divestiture) take into account the fact that broadcasters already have a positive obligation to address themselves to the problems of their communities in their programming and, in so doing, a balanced approach which includes contrasting viewpoints is required. Thus, the broadcaster's own views on matters of concern in the community are but one side of the story which he must present and, if he does present his own views, he must present contrasting views in any event. The KPRC stations have always recognized their fundamental responsibility to fairly present contrasting viewpoints.

34. The separate functions of newspapers and broadcasters is also demonstrated in the news area. KPRC Radio News is a separate and independent news organization with its own requirements, needs and goals. It is the oldest broadcast news service in Houston and was the first broadcast news organization in Houston to employ full-time professional journalists and to put its own reporters in the field. It has no

contractual arrangements or editorial liason with the Houston Post. No employee of the Houston Post makes any contribution to the concept or content of KPRC News.

35. As a general rule, KPRC Radio News reports the news on the hour, 24 hours a day. These reports do not include NBC Network news on the hour which supplements the KPRC newscasts. KPRC regularly preceeds the network news on the hour with what it calls a "Hotline" summary of local and regional events. All KPRC radio newscasts are augmented with voice reports from KPRC's own correspondent staff, NBC regional correspondents and newsmen and KPRC Radio News strives to get the voices of local and national newsmakers on the air as often as possible.

36. On the half hour the radio news department gives a three minute summary of world, national and local events. At noon there is a ten minute summary of the day's events until that time. This report includes local, regional, national and world news. Between 4:30 p.m. and 6:30 p.m. the twice an hour newscasts are expanded to five minutes. At 6:00 p.m. there is a ten minute wrapup of the day's events on the local and national scene. The regular twice an hour news schedule then continues until 10 p.m. when there is another wrapup and items are also included which will appear in the next day's headlines. Regular reports continue throughout the night until the morning drive time arrives.

37. Under the direction of the News Director, reporting directly to the General Manager, KPRC Radio News employe nine newsmen. There is a newsman on duty 24-hours a day in the radio newsroom and the news director is available at all times. KPRC Radio

newsmen are chosen for their journalistic qualifications first and, only secondarily, because of their vocal equipment. The background of KPRC's News Director, John N. Davenport, encompasses experience at all levels of broadcast news, including at the local and network level. That experience includes six years at WFAA-AM-FM-TV, Dallas-Ft. Worth; service with the NBC, NET and ABC networks in Washington, D.C., and three years as Western States correspondent for ABC Network News. KPRC Radio newsmen are divided into two groups: inside men and field reporters. The inside newsmen serve primarily as newscaster-editors. Their assignment is to air the twice-an-hour scheduled newscasts, update and follow up running stories and record tapes from outside correspondents. The inside newsmen have a wide range of experience and education, including assignments in major markets. One staff member is a graduate of the Missouri School of Journalism and has more than twenty years of experience. Another staff member has a M.A. in Journalism. Others are continuing their education.

38. Most of KPRC's field reporters are assigned a regular beat. These beats include City Hall, police, politics, business and education. In addition, KPRC Radio has a full time political reporter covering the state legislature in Austin when the legislature is in session. Field correspondents phone in regular reports as events on their beats develop. In addition to the eight field correspondents in Houston, KPRC Radio News has regular contacts in Austin, Dallas, Ft. Worth, San Antonio and all other major Texas cities.

39. The KPRC-TV News Department today is staffed by 19 full time professional journalists, cameramen and technicians. Additionally, KPRC-TV maintains corres-

pondents in Austin and Washington, D.C. The News Director, a native of Texas with 25 years experience in broadcast journalism, has been in the KPRC organization since 1948. He came to the station from a position as News Director of the principal commercial network in Australia. The KPRC-TV News Staff is separate and independent from the Houston Post news staff in every sense and no employee of the Post makes any contribution to the concept or content of KPRC-TV News.

40. The KPRC-TV News Department produces seven news programs every weekday and two news programs each on Saturdays and Sundays. These programs are telecast at 7:25 a.m., 8:25 a.m., noon, 5:00 p.m., 6:00 p.m., 10:00 p.m. and midnight on weekdays, and at six p.m. and ten p.m. on Saturdays and Sundays. The morning news programs are five minute summaries of state and local news. The six p.m. program is a half-hour report on local and state news, with special Sports and Weather Reports. Late or unusual national or international developments are included. The six p.m. Report is devoted mostly to news of Houston and Texas. On an average day, the work of 10 to 12 staff members will be included in this report, "The Scene at Six", which has been anchored for the past 8 years by Larry Rasco who is a verteran of 20 years in broadcast journalism with previous experience in Dallas and San Francisco. "The Scene at Ten" is a half hour newscast of local, regional and national news. It has been anchored by Steve Smith for the past five years. Mr. Smith came to KPRC-TV from ABC-TV in Detroit. It has several times been cited as the best big city TV News Program in Texas by the Texas Associated Press Broadcasters Association.

41. The KPRC-TV News Department has authority and budgetary latitude to cover any news event in Texas or surrounding States. The department maintains a correspondent-cameraman team in Washington and a correspondent-cameraman team in Austin which are in regular contact with Texas and national lawmakers and federal government departments. The KPRC-TV News department is the only television news organization in Texas with its own desk in the State Capitol newsroom, and with its own Washington correspondent.

42. In the renewal applications for Houston television stations filed on May 3, 1971, the percentage of time on the air devoted to news for the four stations was:

KPRC-TV		11.98%
KTRK-TV	(Capital Cities)	8.00%
KHOU-TV	(Corinthian)	10.68%[16]
KHTV(TV)	(WKY Television)	6.20%

The KPRC and KPRC-TV News Departments have been the recipients of many awards for journalistic excellence. Among them are:

1970 Charles E. Green Journalism Award, (Headliners' Club) For Best TV Spot News Reported

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[16]KHOU-TV's renewal application (Exhibit 9) states that "due to the characteristics of the specific days of the composite week" approximately three-fourths of an hour more of news was programmed than would normally be present in a typical week. For the upcoming renewal period the four stations propose to devote the following percentages of time on the air to news:

KPRC-TV	11.98%
KTRK-TV	8.00%
KHOU-TV	9.90%
KHTV(TV)	5.60%

National Press Photographers' Association, Spot News Film, Third
National Press Photographers' Association, Gen. News Film, Third
National Press Photographers' Association, Team Filming, Honorable Mention
Texas AP Award For Best TV Editorial
Texas AP Award for Best TV News Feature

1969 National Press Photographers' Assn., Best TV News Documentary (For Passage to Prudhoe, NW Passage Trip)
National Press Photographers' Assn., Spot News Film, Third
Texas State Teachers Association School Bell Award For Distinguished Service to Education
Texas AP Award For Best Radio Newscast Over 5 Minutes
Texas AP Award For Best Radio New Special
Texas AP Award For Best TV Editorial
Texas AP Award For Best TV News Feature
Houston Fire Department Distinguished Service Award

1968 Academy of TV Arts and Sciences Citation For "Tell It Like It Is" and Subsequent Series of "Dialog Houston"
Houston Teachers Association Front Line Award For Outstanding Interpretation of Educational Issues
Texas AP Award For The Best TV News Special
Texas AP Award For The Best TV News Feature
Texas AP Award For The Best TV Coverage Of Extraordinary Event
Texas AP Award For The Best TV Newscast
Texas AP Award For The Best TV News Cameraman

Texas AP Award For The Best 15 Minute Radio Newscast
Texas AP Award For Best TV Spot News
Texas AP Special Award For Cameraman (For Coverage of Texas Men in Vietnam)

1966 Academy of TV Arts and Sciences, Regional Emmy For "Guns Are For Killing"
Texas AP Award For Best TV Documentary
Texas AP Award For Best TV Newscast
Texas AP Award For Best Radio Newscast Over Five Minutes
Texas AP Award For Best TV Spot News Film
State Bar Of Texas, Annual Journalism Award

1965 Texas AP Award For Best TV Editorial
Texas AP Award For Best Five Minute Radio Newscast

1964 Texas AP Award For Best Radio News Special
Texas AP Award For Best TV News Special
Texas AP Award For Best Five Minute Radio Newscast
Texas AP Award For Best TV News Feature

1963 Texas AP Award For Spot News Film, TV
Texas AP Award For Feature Newsfilm, TV
Texas AP Award For Best News Special, TV
Texas AP Award For Best TV Newscast
Texas AP Award For Best Radio Newscast
Texas AP Award For Best Radio News Special
National Press Photographers Assn., General Newsfilm, First Place
National Press Photographers Assn., Best Sound On Film, First Place
National Press Photographers Assn., Best Feature Film, Third Place

1962 Texas AP Award For Best 15 Minute Radio Newscast

Texas AP Award For Best 5 Minute Radio Newscast
Texas AP Award For Best Spot Newsfilm, TV
National Press Photographers Assn., Newsfilm Station Of The Year
National Press Photographers Assn., Best Spot Newsfilm (Hurricane Carla)
National Press Photographers Assn., Feature Film, Second Place
National Press Photographers Assn., General Newsfilm, Third Place
Radio and TV News Directors Assn., Best Spot News Reporting For Radio (Hurricane Carla)

1961 Texas AP Award For Spot Newsfilm, TV
Texas AP Award For Public Service, TV
National Press Photographers Assn., General Newsfilm, Second Place
National Press Photographers Assn., Sports Film, Third Place
National Press Photographers Assn., Newsfilm Station Of The Year (Runner Up)

Nearly fifty percent of KPRC-TV's program expenses are devoted to news and public affairs programs.

43. To some extent it appears that the Commission has relied on speculation that commonly owned newspapers and broadcast facilities do not operate within separate journalistic spheres. Here, then, are facts that show the gulf that separates the two branches of the journalistic profession. In Houston, at the KPRC stations, broadcast journalism is a profession and professional integrity is jealously guarded. A factor that the Commission seems to have ignored is that newspaper ownership has, in fact, had a positive influence in the development of that integrity. Common ownership of the KPRC stations with the Post is

responsible, in some part, for the calibre of news operations that has developed at the stations. The Post's owners were, after all, well aware of the necessity for and importance of full, accurate and prompt dissemination in the community of news and information of the community's affairs and are aware of the mass media's role in informing the public. Here, that awareness has resulted in highly professional broadcast news organization. It is not believed that the Commission is blind to the fact that, even now, and even in major markets, "rip and read" and haphazard and less than professional local news gathering efforts exist. Such is not the case at the KPRC stations and never has been.[17] To some extent newspaper ownership and the commitment to a tradition of news and public affairs has contributed to the strength and integrity of the KPRC news operations.

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[17]The seriousness with which the KPRC stations take their journalistic responsibility is best illustrated by Attachment 7, the General Instructions for the KPRC Radio News Department. A comparable detailed and separate set of instructions is also maintained by the KPRC-TV News Department.

[Comments of A.H. Belo Corporation (May 17, 1971), pp. 8-9]

12. Insofar as the Belo broadcast stations are concerned, the assumption underlying the one-to-a-market proposal is contradicted by the facts. The Dallas Morning News and Station WFAA-TV and Stations WFAA AM-FM are operated substantially in the same manner as they would be if each of these properties were separately owned. The news gathering and reporting, the editorial activities and the advertising business of the Morning News are carried on completely independently of WFAA-TV and WFAA Radio. The Belo television station is programmed, staffed and operated independently of WFAA AM-FM. Even WFAA-AM and WFAA-FM are programmed substantially independently of each other although the Commission's Rules would permit WFAA-FM to duplicate WFAA-AM 50% of the time. The Belo stations compete for advertising revenue with each other and with the Dallas Morning News as vigorously as they do with the other radio, television stations and newspapers in the market. Under such circumstances, it is clear that there is no lack of diversity of programming or viewpoints because of the ownership by Belo of a newspaper and broadcast stations in Dallas. So far as competitive practices are concerned, the Belo stations compete with the Dallas Morning News in the same way as they do with the Dallas Times Herald. The Belo television and radio stations compete with each other for audience and advertising revenue as vigorously as they do with other stations in their markets. In the final analysis, how effectively the objectives of the Commission's diversification policy –

competition and diversity of programs and viewpoints – are achieved in a particular market depends not on who owns the media in the market, but on how the media in the market are operated, whoever their owners might be. It is not diversify of ownership, but diversity of programs and viewpoints that are the *desiderata*, so far as the public is concerned. The Commission's rules and regulations which are intended to prevent anti-competitive practices and to promote diversity of programs and viewpoints should be directed to the way stations must be operated, not to who may own them. As the ANPA Comments point out, the anti-trust laws remain available to correct any abuses that might flow from an undue concentration of ownership of media in any market.

[Comments of The Washington Post Company and Post-Newsweek Stations, Capital Area, Inc. (May 17, 1971), pp 2-4]

Autonomy

The "principal purpose of the proposed rules is to promote diversity of viewpoints in the same area . . ." *First Report & Order*: 22 FCC 2d at 313. The Commission also refers to arguments, made without factual support, that common ownership may lessen the degree of competition for advertising or engage in undesirable practices such as special discounts. And the Commission indicates general concern with the possible abuses of undue concentration of economic power.

As a matter of basic ownership philosophy, The Washington Post and the WTOP stations are completely independent of each other. Indeed, the stations and the newspaper compete against each other as if they were separately owned.

The point of contact between the WTOP stations and corporate ownership is at the highest management level where discussions center on general operations, major financial expenditures, overall programming quality and the needs and interests of the community. The stations thus benefit from the experience and expertise of top level company officers, without affecting the stations' complete independence with respect to editorial positions, news and public affairs content and economic competition.

The managements of the broadcast operation and of the newspaper operation are entirely separate.

The sales operations of the stations and the newspaper are also separate and strongly competitive.

There are no joint sales efforts, no combination rates and no combination discounts.[1]

So, too, the news, editorial and public affairs facilities and staffs are independent of each other. News coverage and editorial policies are separately determined. The stations and The Post have taken opposing or differing positions on critical national and local issues. Recent examples include the Philadelphia Plan for minority hiring, the nomination of Judge Clement Haynesworth to the Supreme Court, the D.C. Crime Bill, the construction of dams on the upper Potomac River, highway projects such as the North Central Freeway, the Three Sisters Bridge and Interstate 66, and Maryland Constitutional Amendments. Indeed, the newspaper and the stations have been at odds on issues directly affecting broadcasting. For example, the WTOP stations editorialized against the 1970 campaign spending bill vetoed by President Nixon, whereas The Washington Post supported it.

In short, as Jack Gould, writing in the April 6, 1971, New York Times (p. 97) of the editorial dispute between WTOP-TV and The Post over "The Selling of the Pentagon" put it: "The Post and WTOP-TV pride themselves on their separate autonomies."

It is apparent therefore that divestiture of the Post newspaper or broadcast interests would not add another media voice to the Washington area; indeed, it could well reduce the robust diversity of information and ideas that they provide.

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[1]The sales operations of WTOP and WTOP-TV are similarly entirely separate and competitive, without joint sales efforts or combination rates or discounts.

COMMENTS OF THE PULITZER PUBLISHING COMPANY [May 17, 1971]

The Pulitzer Publishing Company (hereinafter Pulitzer), licensee of KSD and KSD-TV in St. Louis, Missouri, files these Comments in response to the Commission's Notice of Proposed Rule Making in the above-referenced proceeding. The Commission's proposal to eliminate any newspaper-ownership of broadcasting facilities in the same market would not be in the public interest. In support, Pulitzer shows:

1. In 1972, The Pulitzer Publishing Company will complete fifty years as the licensee of KSD and twenty-five years as the licensee of KSD-TV. The broadcast stations have been operated with the same keen concern for public welfare which has characterized publication of the *St. Louis Post-Dispatch.* The Post-Dispatch has been controlled by Joseph Pulitzer and his descendants since the paper was established in 1878. Joseph Pultizer, Jr., Chief Executive of the company at present, is the third member of the family to fill this position.

2. Continuity of management, maintenance of consistent policy and financial stability have been energizing factors in operation of the radio and television stations as well as in publication of the newspaper. Just as The Pulitzer Publishing Company has scored many firsts in journalism with the *Post-Dispatch,* so it has been a pioneer in radio and television.

3. As early as 1904, the company took part in a demonstration of wireless telegraphy at the St. Louis World's Fair. The *Post-Dispatch* set up its World's Fair Bureau at the base of a 300-foot tower. Reporters turned their news stories over to a telegrapher who

transmitted the articles to the newspaper plant four miles away. In another successful test of wireless equipment, a *Post-Dispatch* reporter in 1921 relayed his accounts of a national golf tournament from the St. Louis Country Club links directly to the Sports Department.

4. The *Post-Dispatch* radio station went on the air in 1922, years before commercial sponsorship of programs and paid announcements came into being. KSD was the first radio station to broadcast an entire season of symphony concerts.[1] The first Presidential radio address on a public question was broadcast by KSD.[2] In the 1940's, The Pulitzer Publishing Company experimented with facsimile transmissions in the ultra-high frequency range. KSD-TV went on the air in 1947, when there were only four privately-owned television sets in the St. Louis area.

5. KSD-TV opened a new field in public service television in 1952 when it presented a weekly series of non-denominational programs dramatizing spiritual values. "This Is the Life", produced by the Lutheran Church Missouri Synod, with headquarters in St. Louis, brought KSD-TV an award for outstanding service to religious life. The station has won many other honors. It received a National Emmy Award in 1964 for "Operation Challenge, a Study in Hope", its documentary dealing with the problems in the suburban Negro community of Kinloch. Another award-winner that year was "No Room at the Bottom", a program

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[1] St. Louis Symphony Orchestra season beginning November 11, 1922.

[2] Address delivered by President Warren G. Harding from St. Louis Coliseum June 21, 1923.

stressing the need for vocational training. "The Lengthening Shadow", a documentary produced by KSD-TV in 1966, protested conditions that made the infant mortality rate in St. Louis the second highest in the country. More than 130 hospitals and universities have shown films of this program.

6. To review more than 20 years of public service by KSD-TV would require a volume. Instead, we list some of the programs locally produced in 1970:

"The Black Experience"
A weekly series of discussions planned and executed by members of the Negro community.

"Right to Dissent"
A discussion by two St. Louis attorneys.

"Is the Feminine Mystique a Mistake?"
Opinions expressed by three St. Louis women.

"Campus Unrest"
A discussion by four Washington University students.

"The Drug Scene"
A dialogue between two St. Louis experts and a group of 90 teenagers.

"Bang! You're Dead"
A discussion of gun control in St. Louis.

"Rapid Transit—It's Your Move"
A study of mass transportation in other cities.

"Population Crisis"
An analysis of over-population's effect on ecology.

"Your Public Library"
A report and interview on current acquisitions.

"Taxes—Which Way Now?"
Analysis of taxation principles in the St. Louis area.

"Where There's Smoke"
A discussion by five St. Louis students—a smoker, a reformed smoker and non-smokers.

"The Ride to School"
Personal reactions to busing.

"Commitment to Learning"
A film made at three schools to stimulate improvement in education on the part of teachers and parents.

7. Surely the diversity of opinion provided by these and many other KSD-TV programs is exactly what the Commission is seeking. KSD-TV likewise devotes much time and effort to presentation of station news. The following are percentages of news programming on St. Louis television stations as shown by most recent renewal applications for the Composite Week:

Station	*Hours*	*Minutes*	*Percentages*
KSD-TV	17	28	13.3%
KPLR-TV	3	30	2.9%
KTVI-TV	6	9	4.7%
KMOX-TV	16	15	11.3%

8. The Pulitzer Publishing Company is proud of its broadcast record of community service. Could the Commission expect such a record to be improved – or even equaled - if operations were transferred to others? Could an absentee owner, exercising control from another city, or even a local owner with no newspaper affiliation, offer promise of better service, more willingness to expend time, effort and money on non-revenue programs? Pulitzer does not think so.

9. KSD and KSD-TV have their own news department employing 36 persons, including twelve reporters. While operating independently of the *Post-Dispatch*, the

radio and television stations do have access to the newspaper's reference library, containing 8,000,000 clipings and 2,000,000 photographs. This is an asset sorely missed by a broadcasting station without a newspaper affiliation.

10. KSD-TV was the first television station in the United States to employ a black announcer as a featured performer on a regular program series. This young woman was hired seven years ago, and is still appearing regularly on KSD-TV. The Pulitzer radio and television stations have been powerful voices in the movement to overcome prejudice, and bring full opportunity to minority groups.

11. In the St. Louis metropolitan area there are 30 different owners of broadcasting properties.[3] There is also a great diversity of print media in the St. Louis metropolitan area. In addition to the metropolitan dailies, *St. Louis Post-Dispatch* and *St. Louis Globe-*

[3]Pulitzer Publishing Co., operating KSD and KSD-TV; CBS, Inc., KMOX, KMOX-FM and KMOX-TV; Newhouse Broadcasting Co., KTVI-TV; Laclede Radio, Inc., KATZ Radio, St. Louis, Inc., KSTL; Radio 1380, Inc., KWK; H.S. Schwartz, KXEN; Storz Broadcasting Co., KXOK; Radio WEW, Inc.; Communications Fund, KXLW; Contemporary Media, Inc., KIRL; Belleville Broadcasting Co., WIBV; AVCO, WRTH; Apollo Radio Corp., KACO-FM; Vanguard Broadcasting Co., KADI-FM; University of Missouri, KBMJ-FM; Commercial Broadcasting Co., KCFM; Jeremy D. Lansman & Lorenzo W. G. Milan, KDNA-FM; Foreground Music, Inc., KCRH; St. Louis Board of Education, KSLH; Century Broadcasting, KSHE; School District of Clayton, KHRU; Lindenwood Female College, KCLC; Our Lady of the Snows Broadcasting, WMRY; Thomas N. Evans, KDNL; 220 N. Kings-highway, Inc., KPLR; WIL Music, Inc., WIL and WIL-FM; Luthern Church-Missouri Synod, KFUO and KFUO-FM; Norman Broadcasting Co., WGNU and WGNU-FM; Morell Broadcasting Co., WOKZ and WOKZ-FM.

Democrat, there are six small daily newspapers serving area communities. There are no less than thirty weekly shopping papers providing community news and advertising for their readers.[4] If The Pulitzer Publishing Company were forced to divest itself of KSD and KSD-TV, the 30 ownerships would presumably be increased to 32. Would this small increase in number of owners guarantee any significant further diversification of viewpoint?

4

METROPOLITAN DAILY NEWSPAPERS

St. Louis Post-Dispatch (E & S)
St. Louis Globe-Democrat (M & Weekend)
Alton Telegraph (E)
Belleview News Democrat (E)
Edwardsville Intelligencer (E)
Festus News Democrat (E)
Metro East Journal (E)
St. Charles Banner News (E)

METROPOLITAN ST. LOUIS WEEKLY NEWSPAPERS

Argus
Baden News Press
Citizen
Clayton-Ladue Squire
Claytonian-Tribune
Collinsville Herald
Community Press
County Observer
Florissant Reporter
Jefferson County Journal
Kirkwood Advertiser
Naborhood Link News
Neighborhood Times
North County Journal
North Side Community News
Northwest County Journal
Overland Community News
Rock Township Journal
St. Louis American
St. Louis Countian
St. Louis County Journal
St. Louis County Star
St. Louis Mirror
St. Louis Sentinel
South County Journal
South St. Louis County News
South St. Louis Neighborhood News
South Side Journal
Webster Advertiser
West County Journal

12. It should be noted that the Commission's policy in favor of diversity of expression is shared by Pulitzer. However, the Congress and the Commission have already enacted laws and rules which require all applications for broadcast facilities to meet certain separate ownership standards, and preferences are often accorded applicants who demonstrate the absence of other media accorded applicants who demonstrate the absence of other media ownership in the service area. The Commission has considered the circumstances of undue concentration of control of the means of mass communication in individual cases, whenever demonstrated. There is no such concentration in St. Louis. Absent any showing whatsoever that existing rules, regulations and policies have failed to maintain appropriate licensee responsibility or permitted widespread media monopolization, there is no public interest factor which would suggest, much less require, the drastic across-the-board disarrangement and disruption of broadcast journalism contemplated by the proposed rule. Pulitzer suggests its record proves the independence and responsibility newspaper-owned broadcast licensees normally develop under existing regulatory policies designed to promote the public interest.

13. The programming of KSD and KSD-TV has never been subservient to the *Post-Dispatch*. On the contrary, the General Manager of the broadcasting stations has initiated news programs, film documentaries, editorial opinion broadcasts and public service programs on civic matters, independent of the newspaper. As an officer and board member of the company, the broadcasting Chief Executive has maintained the same high journalistic standards as the *Post-Dispatch,* but the day-to-day programming has been directed entirely independently.

Would divestiture of the broadcasting stations by the company achieve a new dimension in the coverage of public affairs? Could KSD and KSD-TV, operating separately and without the solid financial backing of The Pulitzer Publishing Company, afford to employ news staffs aggregating 36 employees? Would their news programs reflect the legwork, intensive investigation and in-depth reporting required by the Pulitzer management? Would they withstand, as a matter of policy, the superficiality of news bulletins ripped off a teletype machine? Would the new owners commit weeks of work to documentary programs producing no revenue? Would they have the resources to maintain the high level of quality recorded by KSD and KSD-TV under present management? The answer to each is a resounding "No". The Commission should consider the effect on employees, if Pulitzer is required to divest itself of KSD and KSD-TV. Many of these employees have been with Pulitzer for many years and a change of ownership could well place their jobs in jeopardy, besides almost certainly ending their future participation in the Pulitzer Pension and Group Insurance Plans.

14. In short, the St. Louis public would lose far more than it would gain if the Commission forced dissolution of the newspaper broadcast combination. Newspaper and broadcast operations should not be subject to arbitrary, blanket condemnation and forced dissolution by the Commission. Newspaper publishers, as with all licensees, are entitled to judgment on their individual merits, considering all circumstances presented. We believe that, judged on individual merit, The Pulitzer Publishing Company management of KSD and KSD-TV, has fully measured up to the high standards advocated by the Commission. Any pre-judgment and

sentence of forced divestiture would be unfair, unwarranted, and not in the public interest.

15. In addition to the foregoing comments detailing Pulitzer's broadcast record and the total absence of need for the proposed Rule, Pulitzer challenges the assumed authority of the Commission to adopt Rules designed to bar all persons of a certain class — newspaper publishers — from ownership of any broadcast licensee. It is respectfully submitted that any such Rule, which penalizes or prohibits lawful business organizations from ownership of communications media, would constitute an unconstitutional restraint upon freedom of expression and business enterprise, well as have the effect of invidious discrimination against a whole industry, contrary to the Commission's public interest mandate from Congress. Pulitzer fully supports the stance of the American Newspaper Publishers Association in this regard.

16. In conclusion, the Commission has stated that the theory underlying the proposed Rule is that a rule is necessary to assure that there will be adequate diversity of programming, and less concentration of control over communications mass media. The problem here is that there has been no showing that there is any concentration of control, or lack of diversity of programming. Instead, by legislative *fiat*, the Commission would deprive the market of free, unfettered competition by those best able to compete.

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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Nos. 76-1471, 76-1521, 76-1595,
76-1604, 76-1624, 76-1685

FEDERAL COMMUNICATIONS COMMISSION;
CHANNEL TWO TELEVISION COMPANY, *et al.*;
NATIONAL ASSOCIATION OF BROADCASTERS;
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION;
ILLINOIS BROADCASTING COMPANY, INC.; and
POST COMPANY, *et al.*,

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Volume III – Pages 743-1051
EXHIBITS

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TABLE OF CONTENTS

Page

VOLUME III – EXHIBITS

NAB REPLY COMMENTS AND ARGUMENTS ON THE PROPOSED RULES, APPENDICES B, C, AND D (August 18, 1971) 743

REPLY COMMENTS OF STEPHEN R. BARNETT (August 19, 1971), pp. 17-22; 27-40; 73-81; 147-159; 190-194 774

COMMENTS OF POST-NEWSWEEK STATIONS, CAPITOL AREA, INC. (May 1974), pp. 6-17 824

FURTHER COMMENTS OF NCCB (May 15, 1974) 835

SUPPLEMENT TO NAB EXHIBIT C REGARDING CROSS-OWNERSHIP OF BROADCAST STATIONS AND NEWSPAPERS (May 1974) 866

SUPPLEMENTAL STATEMENT OF NAB AND EXHIBIT F REGARDING RECENT TRANSFERS OF BROADCASTING STATIONS (REVISED) (May 1974) 872

FURTHER COMMENTS OF THE PULITZER PUBLISHING COMPANY AND KSD/KSD-TV, INC. (May 15, 1974) 887

REPLY COMMENTS OF POST-NEWSWEEK STATIONS, CAPITOL AREA, INC. (June 17, 1974) 899

FCC PUBLIC NOTICE 26054-B, "HEARING CALENDAR" (July 15, 1974) 922

TRANSCRIPT OF ORAL ARGUMENT IN DOCKET 18110 (July 1974), pp. 130-145; 158-161; 179-181; 186-194; 380-385; 440-445 925

RAND CORPORATION STUDY, R-1585-MF, "NEWSPAPER-TELEVISION STATION CROSS–OWNERSHIP: OPTIONS FOR FEDERAL ACTION: (September 1974), Tables 7-10 967

LETTER TO CHAIRMAN WILEY AND COMMISSIONER HOOKS AND EDWARD HAYES ON BEHALF OF THE NATIONAL BLACK MEDIA COALITION (September 9, 1974) 983

Page

BARNETT, S., "CROSS-OWNERSHIP OF MASS MEDIA IN THE SAME CITY: A REPORT TO THE JOHN AND MARY MARKLE FOUNDATION: (Sept. 23, 1974), pp. 1-2; 10-19; 31-64 990

[NAB Reply Comments and Arguments on the Proposed Rules, Appendices B, C and D (August 18, 1971)]

[APPENDIX B: Comments on Professor Levin's Statement in Docket No. 18110 Before The Federal Communications Commission Concerning Program Diversity and Newspaper-owned TV Stations (June 16, 1971) (prepared by National Economic Research Associates, Inc.)]

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

In a statement presented to the FCC, Professor Harvey J. Levin strongly supports the proposed rules requiring the end of ownership links between newspaper and TV stations operating in the same location. Several aspects of the proposed divestiture are treated in his statement. However, its main concern is with the impact of joint ownership on program diversity regarding which Professor Levin concludes "... the non-newspaper stations in our study have contributed significantly more to diversity and choice."[1] This conclusion, drawn from an empirical study which is appended to his statement, is the basis for Professor Levin's strong support of the proposed FCC rules.

In the statement which follows we examine the study underlying Levin's recommendation and show:

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[1]Statement in Docket No. 18110 before the Federal Communications Commission, *The Policy on Joint Ownership of Newspapers and Television Stations: Some Assumptions, Objectives and Effects*, April 1971; p. 6. All our references to Professor Levin's statement are to this document.

1. The program diversity measure employed by Professor Levin is not an appropriate one;

2. The model designed to isolate the impact of ownership pattern on program diversity was seriously misspecified, rendering the statistical results questionable;

3. Professor Levin erred in the interpretation of his own results. The conclusion "... non-newspaper-owned stations have a statistically significant edge over newspaper-owned stations" (p. 48) does not follow from the reported findings; and

4. The analysis of single station markets (Section III of Levin's Appendix) is carried out within a model which neglects to account for the more important factors determining the program mix of stations, and hence whatever associations it shows cannot be interpreted meaningfully.

II. LEVIN'S MEASURE OF PROGRAM DIVERSITY

Any assessment of Levin's empirical study must begin with the underlying program diversity measure. In essence, the measure he chose reflects the number of different program "types" available to viewers in a given market; that is, the index reflects diversity *across* program types. The fact that Professor Levin recognizes that his measure is deficient (p. 38) does not, of course, overcome its serious flaws.

First and foremost, the measure fails to take account of how extensively viewer preferences are being met. In the absence of such information, there is no reason to believe that Levin's diversity index does in fact correspond with *consumer satisfying* diversity. In a discussion of this aspect at the latest meeting of the

American Economic Association, where Professor Levin's main findings were reported, Professors H. Barnett and E. Greenberg pointed out:

> The problem is to define the central variable, "program types." As noted, according to this theory, only variations across program types constitute diversity while variations within program types do not. The program type boundaries must be dictated by consumer preferences.... But, as we illustrate below, the construction of program types and analysis of the industry in ways consistent with the "program types" theory are extraordinarily difficult, with the result that (so far) the theory has not been successfully applied in an empirical study.[2]

The danger of relying upon Levin's classification scheme can be demonstrated with reference to one of the program types, "feature film." Evidence reported by Barnett and Greenberg shows a high degree of variation in viewership of films, suggesting that consumers do not consider movies to be a single program "type."[3] Policy measures recommended on the basis of a study which totally ignores *within*-program diversity, even where it might conceivably be larger than the across-program diversity, must be viewed with extreme caution.

Levin's program diversity index was also sharply questioned by McGowan and Peck. Commenting on Levin's study at the same meeting of the American Economic Association, they noted:

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[2]Edward Greenberg and Harold J. Barnett, "Program Diversity—New Evidence and Old Theories," presented before the American Economic Association, December 1970, p. 7.

[3]*Loc. cit.*

> Thus, it may be a serious error to base any policy decisions on an analysis which uses a measure of diversity that places a zero value on additional choice within standard program types. *A Levin-type diversity index does just that.* (Emphasis added.)[4]

III. LEVIN'S MODEL

Having formulated the program diversity index, Levin proceeds to determine the effect of ownership within a multivariate regression model, recognizing that only within such a framework can one isolate the effect of any single variable on program diversity. Unfortunately, as we will presently show: (a) Levin's inclusion of a market size variable in the model is not supported by accepted theory and probably results in a serious estimation bias of the other included variables; and (b) the model actually employed did not permit Levin to identify the *net* impact, if any, of newspaper ownership status because of specification errors.

There is substantial agreement among economists about the factors expected to influence program diversity. More specifically, following Steiner's original formulation, these variables are the number of stations in the market and the disparity in preferences of the audience in the market.[5] Although Levin apparently

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[4]John J. McGowan and Merton J. Peck, "Television: Old Themes, Current Facts and Future Policy," Discussion of Presented Papers before the American Economic Association, December 1970, p. 9.

[5]Peter O. Steiner, "Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting," *Quarterly Journal of Economics*, Vol. LXVI, No. 2, May 1952, pp. 194-223.

agrees with this view (p. 33), the model he employs does not include either of these variables.

This error of omission is seriously compounded by an error of commission. Professor Levin includes in his model an explanatory variable—market size—which is not based on adequate theory, and which will give rise to biased estimates of the other coefficients.

Levin's rationale for including a market size variable is astonishing: "Presumably the larger stations in the larger market, with more advertiser income, are on that count better able to sustain unprofitable news and public affairs programming, and hence to contribute to diversity as conceived here" (p. 40). The suggestion that diversity in larger markets is due to broadcasters' willingness and *ability* to sustain unprofitable programs violates expected behavioral patterns and must be viewed with considerable skepticism. Furthermore, Levin nowhere shows that the greater diversity in larger markets is in fact a reflection of a larger number of news and public affairs programming. Indeed, given Levin's index of diversity, there is no way of telling whether the greater diversity is a result of more "educational" programs or of the other thirteen "entertainment" programs (p. 35).

Especially sharp criticism of Levin's market size variable comes from McGowan and Peck. Commenting on Levin's findings they noted:

> Our suspicions of bias are raised by Levin's variable, X_3, defined as net weekly circulation (NWC) divided by commercial station quarter hours. While Levin indicates that this variable was chosen over alternative measures because it gave a better fit to the data, he provides no explanation of why market size itself should be a determinant

of the extent of diversity. Nor is the role of market size evident from the original Steiner formulation of the problem. Steiner's analysis emphasized the *distribution* of viewer preferences, not the absolute magnitude of potential audiences. Whatever the rationale for including a market size variable, we suggest the measure used should be chosen on the grounds of its suitability as a proxy measure for the hypothesized effect and not on goodness of fit criteria.[6]

McGowan and Peck's concern with Levin's market size variable is not a mere theoretical issue. Since the market size variable is likely to be correlated with the number of TV-homes in the market, they add, "Our suspicion then is that the variable X_3 is absorbing some of the effect of additional broadcasting on diversity."[7] In other words, some of the coefficients obtained by Levin are most likely biased. These biases will be discussed below.

Levin understands well that a serious attempt to establish the net impact of newspaper ownership on program diversity can only be undertaken within a model which *simultaneously* isolates the effects of all other explanatory variables, and in describing his approach he claims: "We have also utilized more sophisticated techniques to isolate out the relative impact of newspaper ownership and other relevant factors in explaining the range of choice and diversity" (p. 10). Unfortunately, as we will now show, this promise is not fulfilled in the study presented to the Commission.

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[6] McGowan and Peck, *op. cit.*, pp. 6-7.

[7] *Ibid.*, p. 7.

The explanatory variables for program diversity are listed in Table 3 (p. 39). They are:

X_3 = ARB net weekly circulation in market, divided by number of quarter-hour program units broadcast by all commercial stations therein

X_4 = number of quarter-hour program units broadcast by commercial stations

X_5 = number of quarter-hour program units broadcast by ETV stations

X_6 = number of quarter-hour units broadcast by independent stations

X_7 = number of quarter-hour units broadcast by network affiliates or stations

X_8 = number of quarter-hour units broadcast by single-owned stations

X_9 = number of quarter-hour units broadcast by group-owned stations

X_{10} = number of quarter-hour units broadcast by newspaper-owned stations

X_{11} = number of quarter-hour units broadcast by non-newspaper stations

Setting aside the market size variable (X_3) whose deficiencies were noted earlier, one infers from Levin's selection of variables that program diversity will also depend on whether the station is commercial or educational, network affiliated or independent, group- or single-owned and, finally, newspaper- or non-newspaper-owned. Yet, none of the equations reported by Levin in either Table 4 or 5 contains simultaneous estimates of all these variables. A quick examination of Levin's regression results will show that he was unable to estimate coefficients for more than one pair of

variables at a time. (See, for example, Equations 1, 2, 7 in Table 4 and Equations 4, 6 in Table 5.) The inability to obtain meaningful estimates of *all* variables specified by Levin's hypothesis is, we suspect, a result of faulty model specification. Since $X_4 + X_5 = X_6 + X_7 = X_8 + X_9$, a data matrix containing more than one of these variable pairs is singular, rendering meaningful estimates of all variables impossible.

As a consequence of this Levin was not in fact able to properly test his model. Consider, for example, Equation 6, Table 5, from which Professor Levin deduces that non-newspaper-owned stations have greater impact on program diversity. Yet, the specification he employs does not permit him to ascertain whether the effect of newspaper ownership is not a result of another ownership pattern, namely, of whether the station is single- or group-owned. Similarly, the effect attributed to newspaper ownership status in Equations 3 and 7 of Table 4, may, in fact, be a result of whether the station is independent or network affiliated, single- or group-owned.

IV. INTERPRETING LEVIN'S STATISTICAL FINDINGS

So far we have been concerned with Levin's analytical framework. We will now show that the results he obtained are: (a) biased, and (b) do not support the conclusions drawn from them.

McGowan and Peck demonstrate convincingly that Levin's market size variable, criticized earlier in detail, biases downwards other coefficients in the same model. In particular, it probably underestimates the true contribution to program diversity brought about by

additional commercial broadcasting hours. The existence of the bias is argued as follows:

> Thus we suspect Levin underestimates the impact of commercial broadcasting relative to ETV broadcasting on effective viewing options.
>
> These suspicions are heightened upon further examination of his estimates. As noted, they imply an average degree of duplication among commercial stations in excess of 40 percent regardless of whether the stations are network affiliates or independents. Though there is admittedly a trend toward increasing frequency of deletion or delay of network programs, affiliates still rely predominantly on network programs during prime time. One would expect then that the degree of duplication among affiliates would closely parallel the degree of duplication among network schedules. Yet, using program categories similar to Levin's the extent of duplication in prime time network programming is much closer to twenty than forty per cent. Indeed, Levin's estimates of average number of options per program unit reported in his Table 3 indicate 1.74 in a two station market and 2.40 in a three station market. Implied in these estimates is an average rate of duplication of (2.00-1.74)/2.00 = .13 in two station markets and of (3.00-2.40)/3.00 = .20 in three station markets.
>
> These calculations suggest to us that the 'true' value of the marginal impact on diversity of additional commercial, particularly affiliated station, quarter hours may be substantially larger than Levin estimates and may, in fact, be quite

similar to the magnitude he finds for ETV broadcasting.[8]

Let us now consider the evidence cited by Levin for his major conclusion that newspaper-owned stations do not enhance program diversity as much as non-newspaper-owned stations (Equations 4 and 7 in Table 4 and Equation 4 in Table 5). In explaining these results, Professor Levin says, "In Table 5, Equation 4, e.g., other things equal, commercial choices rise by about 62 for every 100 units broadcast by group *or* single owners. Whereas an added 100 units from newspaper- and non-newspaper-owned stations will yield 61 and 64 choices, respectively (a statistically significant difference)" (p. 49). This statement is in error. All other things are not held constant in the derivation of the estimates. In Equation 4, Table 5, the only variable which is controlled is market size; variables X_8 and X_9, whether the station is single- or group-owned, are not taken into account. But most astonishing is the statement that the difference between the effects of newspaper and non-newspaper ownership of the station is statistically significant, a statement which is made without the required probability tests. Since the data for performing the necessary test are not provided in Levin's statement, we could not evaluate his assertion.[9] However, a simple evaluation of the reported results indicates that one cannot reject the hypothesis that

[8] *Ibid.*, pp. 7-8.

[9] The hypothesis that the *difference* between two regression coefficients is insignificant (H_0: $b_1 - b_2 = 0$) can only be evaluated on the basis of a comparison of the residual sum of squares under it and under the alternative hypothesis ($b_1 - b_2 \neq 0$). See N. R. Draper and H. Smith, *Applied Regression Analysis* (New York: Wiley & Sons, 1967), Section 2.10.

newspaper-owned stations have the same effect on program diversity as non-newspaper-owned stations. That is, one cannot reasonably reject the hypothesis that the X_{10} coefficient in Equation 4, Table 5, came from a distribution with a mean value equal to the coefficient of X_{11} ($H_0 = b_{10} = b_{11} = .6402$; $ab_{11} = .0393$). Given such an underlying distribution and independence of variables, a difference as great as that reported between newspaper- and non-newspaper-owned stations would be observed with a frequency of about forty-eight times in a hundred.

V. THE ANALYSIS OF SINGLE STATION MARKETS

In the last section Levin seeks to determine whether newspaper ownership affects the extent of local originations and the frequency of news, and of instructional and public affairs programs.

The analysis is carried out with the aid of a two-day classification of stations and programs (Table 6). Even though the results cited by Levin for single markets are not distinctly adverse to newspaper-owned stations,[10] the framework employed must be rejected because it ignores entirely the most important determinants of a station's program mix. For example, earlier in the statement (p. 40), Levin argues that the larger stations are more able to carry the unprofitable news and public affairs programming; yet in the analysis of Table 6 no account is taken of this factor.

[10] "As for news, instructional, and public affairs, with one exception the pattern seems similar. In one-station markets, statistically comparable numbers of news programs are carried by network affiliated Vs and Us without newspaper ties" (p. 52).

Similarly, other factors known to influence the station's decision regarding program mix—the demographic and economic characteristics of the market—are neither mentioned nor introduced into the analysis. The same issues can be raised with respect to frequency of local originations. Obviously, any attempt to isolate the impact of newspaper ownership on the number of local originations can only be made within a model which simultaneously takes into account the effect of the probably more important economic and marketing factors. A properly designed study must distinguish between live and automated originations. Since local originations obviously depend both on the revenue potential of the program and production costs, the simplistic two-variate association presented by Levin must be dismissed as totally inadequate for policy guidelines.

APPENDIX

PROFESSIONAL RESUME OF DR. M. MARCUS

Dr. Marcus holds a B.A. degree from Brooklyn College (1959), and a Ph.D. degree in Economics from Brown University (1963). He is a special consultant with NERA, and a member of the faculty of the Department of Economics at Rutgers University where he teaches courses in economic theory and industrial organization.

Dr. Marcus has conducted research into various aspects of industry performance and behavior. His articles appear in various scholarly journals including *Land Economics, The Review of Economics and Statistics, The Southern Economic Journal* and *The Canadian Journal of Economics.*

[APPENDIX C: Addendum 1 to UR-150-A; Reply Comments in Relation to FCC Docket 18110 (June 10, 1971) (prepared by A Division of Resource Management Corporation)]

INTRODUCTION

This paper is prepared in response to Dr. James N. Roose's[1] recent memorandum questioning the methodological underpinnings of the earlier RMC Report UR-150, "A Quantitative Analysis of the RMC Effects of Joint Mass Communication Media Ownership" prepared by RMC under contract with the National Association of Broadcasters. In developing these reply comments we are animated by the desire to clarify the main differences

[1] James N. Roose "Credible and Incredible Economic Evidence Reply Comments in FCC Docket 18110." Memorandum No. 109, Stanford University Research Center in Economic Growth, Stanford, California, April 1971.

between our approach and the earlier Stanford University Research Center in Economic Growth Memorandum,[2] which was presented as evidence with regard to the Federal Communications Commission Docket 18110.

Before immersing ourselves in the rebuttal of Dr. Roose's comments, it is worthwhile to review the study objectives RMC set out to accomplish. These objectives included the conducting of an empirical investigation of the factors influencing price behavior of the mass communications media, but mainly the study was concerned with examining whether jointly owned mass media exhibited a different price behavior than mass media not under joint ownership.

Specifically the study was designed to investigate the issues raised by the earlier Roose, Owen and Grey paper[1], which developed communication media price behavior equations characterized by the absence of any audience/circulation variables among the exogenous variables, based on an alleged endogeneity of audience size. The fact that contrary to common sense, no audience size measure – either current or lagged – appeared in their reduced-term equations led RMC, Inc. to undertake the research proposed by the National Association of Broadcasters, based on our belief that proper consideration and reflection of the influence of audience size would

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[2]James N. Roose, Bruce M. Owen and David L. Grey, "Economic Issues in the Joint Ownership of Newspaper and Television Media Comments in Response to Further Notice of Proposed Rule Making. Federal Communications Commission Docket 18110" Memorandum No. 97 Stanford University Research Center in Economic Growth, Stanford, California, May 1970.

[1]James N. Roose, Bruce M. Owen and David L. Grey, *op. cit.*

clear up the issue of whether there was a positive differential price behavior associated with joint media ownership.

On the RMC Approach

Basically the RMC research design followed the premise that the reduced-form price behavior equation of a properly specified communication media price determination model would include among the exogenous variables either current or lagged audience size, depending on the investigator's viewpoint on the critical issue of endogeneity of the audience size variable.

The first viewpoint, namely that current circulation size is not endogenous, leads to its inclusion among the independent variables of Owen's reduced-form equations. This procedure was followed and we estimated the Owen equations in their original form and with the inclusion of audience size, showing that the statistical significance of the joint ownership variables found by Dr. Roose and his colleagues diappeared if current circulation size was admitted among the exogenous variables.

The second viewpoint that current circulation is indeed an endogenous variable would have led to different estimation procedures to acknowledge the price-audience size relationship. Originally we had proposed estimating the price behavior equation through the instrumental variable technique, selecting lagged audience/circulation size as the instrumental variable. However, this would have required the development of a special computer program for this task, which the limited study resources would not permit.

In view of the financial limitations of the study, we decided instead to apply another simulataneous equation technique, which has been shown to be almost identical

to an instrumental variable, namely two-stage least squares. Development of a two-stage least squares model requires some consideration of the structure of the price behavior structural equations. However, since data on some important variables that might affect price behavior, such as station programming expenditures are not officially published and since our objective was simply the estimation of the price behavior equation, we decided to develop a simple two equation model to support the two-stage least squares estimation of the price behavior structural equation. It is interesting to note that our formulation of the two-stage least squares model leads to a reduced-form price equation including lagged circulation size among its exogenous variables.

The limited study objectives of the RMC research should be noted. Indeed we did not envision the formulation of a complete set of structural equations of the communications media, mainly because some of the data warranted for such an endeavor are confidential. Our earlier research document acknowledged the fact that some important data items were unavailable, while also stating our conviction that a proper formulation and specification of the model with programming expenditures and other unpublished data would strengthen our results.

With the issues in proper background we will now consider Dr. Roose's criticisms,[1] which are directed against our: i) alledged model misspecification, ii) alledged incorrect estimation methods, and iii) alledged multicollinearity.

[1] James N. Roose, *op. cit.*

Alleged Model Misspecification

The key of the controversy regarding the RMC Report and the earlier Roose-Owen-Grey research is that we argue that a proper specification of the price behavior equation would have led to a reduced-form equation including either current circulation (in case this variable is not accepted as a jointly dependent variable) or lagged circulation variables whenever the joint dependence hypothesis is accepted. There are strong arguments as to why lagged circulation would appear as an exogenous variable in lieu of current circulation even if the joint dependence is not accepted, since fall station advertising rates are based mainly on spring circulation. Thus, Dr. Roose misrepresents our position when he argues that we concentrate on the "entirely improper question of whether or not an endogenous variable belongs in a reduced form equation."[1]

If circulation either of television stations or daily newspapers is not jointly dependent with advertising rates, then it is obvious that a reduced-form price behavior equation would have had to include current or lagged audience/circulation among its exongenous variables. Several reasons can be advanced in support of this proposition; let us start by examining the statistical concept of endogeneity.

In the case of the estimation of a price behavior equation, with prices as dependent variables and circulation among the explanatory variables, prices and circulation are jointly dependent variables whenever the error terms of the equation are correlated with circulation size, thus breaking the classical least-squares assumption that the expectation of error terms and independent

[1] James N. Roose, *op. cit.*, pp. A-41.

variables be zero. Jointly dependent variables in an equation usually occur when the two variables are jointly determined by the same process such as prices and quantities of supply and demand analysis, or consumption and income of national income analysis. In the presence of strong lags in television markets where fall advertising rates are determined on the basis of spring circulation, and where programming decisions take time before they materialize in audience/circulation changes, the process through which advertising rates affect audience is so roundabout that no identification bias will result by adding audience as an exogenous variables to Bruce Owen's reduced-form equations. In any event Dr. Roose and his associates could have no objection to introducing lagged audience/circulation in the reduced-form equation, and this procedure would be somewhat in line with our two-stage least squares procedure.

Our simultaneous equation approach to the price behavior equation was formulated to permit the estimation of a function relating prices to audience/circulation size free of bias in case circulation was assumed to be jointly dependent with advertising rates. In view of our scope and financial limitations, the decision was made to apply a simple two-stage least squares model in which lagged audience/circulation would play a significant part, since this procedure has been shown by Goldberger [1] to be identical with instrumental variable estimation techniques. We did not propose to engage in an exhaustive multi-equation approach in view of the lack of data that would have prevented its estimation.

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[1] Arthur S. Goldberger, *Econometric Theory*, John Wiley & Sons, Inc., New York, 1964, p. 337.

Dr. Roose attacks our two-stage least-squares formulations as ambiguous; he claims that he doesn't know whether they are structural relations or not, or which agent's economic behavior is being modeled or described by each equation.[2] This criticism has not prevented him from expanding our simplified two equation model, conserving a modified version of our price and audience equations. We did not expand our model to avoid the problems involved in gathering data on items such as programming expenditures and amounts of time purchased by national advertisers — data items not officially published.

Recapitulating the discussion, we should note that the crux of the matter remains the acceptability of either current audience/circulation or its lagged value as an exogenous variable to be included in the reduced forms equations. Our two-stage least squares by including lagged audience/circulation amounts to the use of lagged audience as an instrumental variable. If one accepts the view that the relation of advertising rates to joint ownership variables cannot be examined without due consideration of audience/circulation either in its current or lagged values, then the RMC approach holds valid. If one accepts the view of Roose and his colleagues[1] that a reduced form price equation had no reason to consider either current or lagged circulation as exogenous variables, then the RMC approach is no longer valid.

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[2] James N. Roose, *op. cit.* pp. A-38.

[1] James N. Roose, Bruce M. Owen, and Davis L. Grey, *op. cit.*

Alleged Incorrect estimation

The critical comments on the estimation procedures used in the RMC report[2] made by Dr. Roose refer to both the use of ordinary least squares methods in the presence of the audience/circulation size, and to the incorrect standard errors of two-stage least squares.

The RMC ordinary least squares regressions were applied to functions similar to Bruce M. Owen's except for the fact that they included audience/circulation size as exogenous variables, after postulating that audience/circulation size could not be truly classified as endogenous variables. If these variables are accepted as exogenous, then no simultaneous equation bias could result from the application of ordinary least – squares to the data base. If they are endogenous, we admitted that simultaneous equation estimation techniques would have been warranted, as in the development of our two-stage least squares model.

The citicisms of the two-stage least squares procedure are directed against the fact that two-stage least squares estimates are less efficient than ordinary least squares estimates plus the fact that the introduction of two-stage least squares is responsible for the alleged multicollinearity of the RMC results. A careful analysis of changes in the regression of coefficients and their standard errors in response to changes in the estimation procedure from ordinary to two-stage least squares reveals that the changes in standard errors of the regression coefficients have hardly been enough to change the statistical significance of the regression

[2]RMC, Incorporated, *A Quantitative Analysis of the Price Effects of Joint Mass Communication Media Ownership*, RMC Report UR-150, Bethesda, Maryland, March 1971.

coefficients, so that the less efficient estimates associated with two-stage squares are not responsible for any major changes in the study results. That is, they are inconsequential to the study results.

The second argument regarding the multicollinearity introduced by the two-stage least squares ignores the critical role played by the lagged audience/circulation variable as a "quasi-instrumental" variable. These lagged variables dominate the estimation of the predicted values of circulation/audience and furthermore they do not appear in the equation estimates except in this indirect fashion, so that the problem of multicollinearity although present in some instances (i.e., analysis of agency newspapers) is kept within manageable bounds. The next seciton reviews in greater detail those changes on the alleged multicollinearity.

Alleged Multicollinearity

Dr. Roose argues in his rebuttal that both our ordinary least-squares and the two-stage least squares model are subject to multicollinearity. His argument is that both the audience size variable of the ordinary least-squares and its predicted value in the two stage least-squares are correlated with the joint ownership and other explanatory variables and that this multicollinearity is responsible for our results.

Regarding the ordinary least squares model, we noted in our report where multicollinearity obscures the results of the investigation, as for instance the discussion of collinearity between monopoly, duopoly and agency newspapers in the newspaper regressions; this subject was completely glossed over in the Roose-Owen-Grey original submission.[1] Apart from this in-

[1]James N. Roose, Bruce M. Owen and David L. Grey, *op. cit.*

stance multicollinearity is hardly a problem in the RMC ordinary least squares runs.

A crude role of thumb regarding multicollinearity is that whenever the correlation between two independent variables exceeds their correlation with the dependent variable, there is a strong supposition that multicollinearity is present. A look at our correlation matrices (Tables A-1 and A-3 of the RMC Report) reveals that the introduction of the Quarter Hour Audience size variable has hardly affected the pattern of relatively low collinearity in the television data base. Only one variable, the VHF dummy variable, is more correlated with Quarter Hour Audience than with any of the remaining dependent and independent variables. In the Television data base the correlations of the independent variable with the dependent are reasonably close to the highest correlation between any two independent variables, except in the case of network affiliation.

With the exception of the Monopoly, Duopoly and Agency collinearity, the correlation matrix of the newspaper data base also disproves Dr. Roose's[2] multicollinearity contention in the ordinary least squares regressions. Not only are independent variable correlations with circulation relatively close to their correlations with the dependent variable, but also only in the case of the Income variable is an exogenous variable more correlated with circulation than with another exogenous variable. Thus it would appear that multicollinearity poses no major problem except in the analysis of the differential price behavior of agency newspapers.

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[2]James N. Roose, *op. cit.*, pp. A-32 and A-33.

With regard to the two-stage least squares model, Dr. Roose argues that since predicted circulation/audience size is a linear combination of all the other independent variables in the model, its inclusion in the model would have the effect of introducing multicollinearity. In the absence of the correlation of the predicted audience size variable with the other independent variables, the analysis of multicollinearity in the two-stage least squares must focus on changes in the values of the regression coefficients and their respective standard errors, whenever the estimation procedure changes from ordinary to two-stage least squares methods.

In the case of the newspaper regressions, the evidence of multicollinearity from the application of two-stage least squares is negligible. Regression coefficients or their standard errors are hardly altered as a result of changing from ordinary to stage least squares methods, with only the income, monopoly and duopoly variables changing somewhat. The joint ownership and the chain ownership variables remain insignificant regardless of the estimation procedures.

With respect to the television runs, only the VHF and the network affiliate variables change appreciably as a result of applying two-stage least square regressions; no major changes occur in the statistical significance of the other exogenous variables. In view of the relative stability of the regression coefficients and their respective standard errors regardless of the estimation method used, we conclude that multicollinearity poses no insurmountable problems to the interpretation of the results of the RMC study.

Finally, we should add a note of common sense regarding advertising price behavior that reflects the

fact that television advertisers are charged prices according to the viewing audience at different times of the day ane even the week, and that these hourly audience differences explain much of the structure of television rates.[1] It would appear proper that audience/circulation size be explicitly taken into account as exogenous variables either in their current or lagged values when estimating reduced-form price behavior equations.

APPENDIX D

I. BACKGROUND

In the comments submitted by James N. Roose, Bruce M. Owen, and David L. Grey in Docket 18110, it was argued that jointly-owned newspapers and television stations charge significantly higher prices for national advertising. This argument was supported by an econometric study conducted by Dr. Owen.

In one of Dr. Owen's analyses, the effect of joint ownership on prices charged by television stations was investigated. In the analysis, the following variables were in effect held constant by statistical techniques, since they might affect price:

Population
Income
Network Affiliated
VHF Station
Competes with Newspaper-owned Station

[1] See John L. Peterman, "The Structure of National Time in the Television Broadcasting Industry", *The Journal of Law and Economics*, October 1965.

Results from the analysis indicated that, on the average, newspaper-owned stations charge 15% more than other stations. In a similar analysis, it was found that jointly-owned newspapers charge 10% more on the average than other newspapers. The conclusion which Dr. Owen drew from these findings was that jointly-owned newspapers and television stations "charge monopoly prices."

There is more than one possible interpretation of the results from Dr. Owen's study, however. As can be seen from Table I, the audience to the average newspaper-owned television station is larger than the audience to the average non-newspaper-owned station.

	Average quarter-hour audience (prime-time)
Average Newspaper-owned Station	76,000
Average Non-Newspaper-owned Station	57,800

TABLE I

Television Audiences

Although the data in Table I suggested that differences in audience size might be reflected in the differential prices found in Dr. Owen's study, the extent to which this was true could not be determined without additional research. This research was conducted by Resource Management Corporation (RMC) at NAB's request, and was included with NAB's comments in Docket 18110 as Exhibit B.

A part of the RMC project duplicated Dr. Owen's work, and essentially the same results were obtained.

The remainder of the RMC findings indicated, however, that jointly-owned television stations are able to charge higher prices because they obtain larger circulations.

The principal difference, therefore, between the RMC study and the Owen analysis, is that RMC took into account television station audience and newspaper circulation in predicting advertising rates. Owen declined to do so, on the grounds that these audience and circulation variables were endogenous:

> Each equation, estimated by ordinary least squares, is in reduced form; endogenous variables are excluded. In a completely specified reduced form set of equations describing the firm or market in question, circulation or audience size would be an important endogenous variable, and is therefore excluded from all the equations reported below.[1]

According to a leading econometrician, however, the distinction between exogenous variables is not necessarily the important one. In his textbook on econometric theory, Arthur Goldberger points out:

> The variables of the system are classified into endogenous variables and exogenous variables according as the theory is or is not intended to account for their values. . . . For most statistical purposes, however, the relevant distinction is between jointly dependent variables and predetermined

[1] ECONOMIC ISSUES IN THE JOINT OWNERSHIP OF NEWSPAPER AND TELEVISION MEDIA, Studies in the Economics of Mass Communication, Stanford University: Stanford, California, May 1970. P. 5.

> variables. The jointly dependent variables are the current endogenous variables; the predetermined variables are the exogenous variables and the lagged endogenous variables. A lagged exogenous variable should be considered simply as a distinct exogenous variable.[2]

If a *lagged* audience variable is used, therefore, there can be no question about whether such a variable is jointly dependent – it can only be predetermined. In an effort to provide additional information, the NAB staff undertook a modest effort to develop a model of pricing behavior using lagged auidence data. This model is described in the following section.

II. LAGGED AUDIENCE MODEL

The purpose of this effort was to obtain additional empirical evidence concerning the effect of joint ownership on television advertising rates.

In order to cast the hypothesis that, *ceteris paribus*, jointly-owned television stations charge higher prices than other stations into a form in which it could be tested statistically, the following linear model was formulated:

$$y_i = a_o + b_1 x_{1i} + \ldots + b_9 x_{9i} + \epsilon_i$$

where:

y_i = log of highest prime-time Class A hourly rate of station i during 1970

x_{1i} = log of average prime-time quarter-hour audience of station i in Fall of 1968-69 television season

[2] ECONOMETRIC THEORY, John Wiley & Sons, Inc.: New York, 1964. Page 294.

x_{2i} = log of SMSA (or city, as appropriate) population in 1970, in thousands

x_{3i} = dummy variable which takes a value of 1 if the station i was owned by the local daily newspaper during 1970, 0 if not

x_{4i} = SMSA personal per capita income during 1969 in dollars (1970 income data was unavailable as of the time of the study)

x_{5i} = dummy variable which takes a value of 1 if the station i was a VHF station during 1970, 0 if not

x_{6i} = dummy variable which takes a value of 1 if the station i was a network affiliate during 1970, 0 if not

x_{7i} = dummy variable which takes a value of 1 if the station i competed against a local newspaper-owned station in the market during 1970, 0 if not

x_{8i} = dummy variable which takes a value of 1 if the station i owned or was associated with a local radio station during 1970, 0 if not

x_{9i} = dummy variable which takes a value of 1 if the station i had a VHF monopoly during 1970 in its market area, 0 if not

ϵ_i = a random unobserved disturbance

The variable x_{1i} was included in the model to reflect the lagged relationship between audience size and price. It is a predetermined variable, and can properly be included in a reduced form equation.

The model was estimated at least squares from observations on a sample of 503 television stations. Audience data were obtained from the November 1968 local market reports of the American Research Bureau; data compiled by RMC were used for the other variables. The regression coefficients and their standard errors (in parentheses) are listed below:

Intercept	.0449
	(.248)
Log Quarter Hour Audience	.4281
	(.0186)
Log Population	.1772
	(.0140)
Newspaper–Owned	-0.0114
	(.0329)
Log Income	.4902
	(.0325)
VHF	.1191
	(.0374)
Network Affiliate	-0.1034
	(.0540)
Competes with Newspaper-owned Station	.0387
	(.0277)
Radio Owner	.0028
	(.0260)
VHF Monopoly	.0155
	(.0427)
R^2	.90

According to these data, the effect of newspaper ownership of a television station on the rates charged by that station is not significant.* This result is similar to that obtained by RMC, and contradicts the Owen conclusion.

One additional observation about these results is of statistical interest. Table II compares the standard errors of the coefficients in this study with the standard errors obtained in the RMC and Owen analyses. As Table II shows, the standard error on the newspaper ownership variable is largest in the Owen study, and smallest in the regression described in this Appendix. Introducing audience data – particularly lagged audience data – leads, therefore, to more precise estimates of the impact of newspaper ownership on advertising rates, and reinforces the importance of including audience data in the analysis.

*The newspaper-ownership coefficient is, in fact, negative – suggesting that newspaper-owned stations charge lower rates – but is not statistically significantly different from zero.

	Owen	RMC – Ordinary Least Squares	RMC – Two-Stage	NAB
R^2	0.7480	0.8371	0.8619	0.9000
Intercept	-2.1296	-0.4723	0.2185	0.0449
	(.8710)	(.7127)	(.6862)	(.2480)
Log Quarter Hour Audience		0.3124	0.4770	0.4281
		(.0184)	(.0230)	(.0186)
Log Population	0.3843	0.2222	0.1433	0.1772
	(.0136)	(.0146	(.0156)	(.0140)
Newspaper-Owned	0.0760	0.0037	-0.0291	-0.0114
	(.0510)	(.0420)	(.0391)	(.0329)
Log Income	0.6760	0.5307	0.4702	0.4902
	(.1091	(.0886)	(.0853)	(.0325)
VHF	0.5863	0.2323	0.0558	0.1191
	(.0422)	(.0403)	(.0408)	(.0374)
Network Affiliate	0.5576	0.1722	0.0047	-0.1034
	(.0607	(.0541)	(.0530)	(.0540)
Competes with Newspaper-Owned Station	0.0484	0.0252	0.0200	0.0387
	(.0418)	(.0338)	(.0314)	(.0277)
Radio Owner		0.0280	-0.0106	0.0028
		(.0290)	(.0272)	(.0260)
		-0.0612	-0.0159	0.0155
VHF Monopoly		(.0507)	(.0470)	(.0427)

TABLE II

Comparison of Regression Coefficients

Reply Comments of Stephen R. Barnett
[(August 19, 1971), pp. 17-22; 27-40;
73-81; 147-159; 190-194]

TABLE OF CONTENTS

I. INTRODUCTION 1

A. *Recommendations* 5

B. *The Impact of the Citizens Communications Center Decision* 11

II. THE VALIDITY OF MAXIMUM FEASIBLE DIVERSIFICATION AS A POLICY OBJECTIVE 17

A. *The Policy As Expressed by the Commission in These Proceedings* 18

B. *The Challenge to the Diversification Policy* 22

C. *Sources of the Diversification Policy* 27

III. THE ADEQUACY OF THE EXISTING DIVERSITY 41

A. *The Seiden Study and NAB's Use of It* 42

B. *Diversity or Concentration? The Existing State of Media Control in American Cities* .. 53

C. *The Newspaper Preservation Act* 62

IV. THE ALTERNATIVE OF DEALING WITH ALLEGED UNDUE CONCENTRATION THROUGH AD HOC LICENSING DECISIONS INSTEAD OF RULE MAKING 73

A. *Must the Commission Consider "Undue Concentration Per Se" in the Absence of Alleged Abuses?* 75

B. *The Commission's Present Position on the Choice Between an Ad Hoc And a Rule-Making Approach to Undue Concentration at the Local Level* 81

C. *Implications for the License-Renewal Policy* 87

D. *The Prospect of Hearings on the Concentration Issue* 89

E. *The "Case Law" to Be Applied and Developed in Dealing With Undue Concentration on an Ad Hoc Basis* 92

F. *Implications for the Commission's Credibility* 101

V. THE LOCAL DAILY NEWSPAPER AND THE LOCAL CATV SYSTEM: "ABUSES," "EVILS," AND THE AD HOC APPROACH 103

A. *Applicability of the Ad Hoc Approach* 104

B. *Foreseeable "Abuses and Evils" in the Newspaper-Cable Context* 110

C. *Evidence That the Foreseeable Effects Occur* 120

D. *Newspaper Control Versus "Conglomerate" Control* 142

VI. THE IMPACT OF LOCAL-NEWSPAPER OWNERSHIP ON BROADCAST EDITORIALIZING 147

VII. THE COMMISSION'S AUTHORITY TO ADOPT THE PROPOSED RULES 160

A. *Sources of the Commission's Authority* 162
B. *The NAB-ANPA Argument Against the Commission's Authority* 167
C. *The Commission's Authority to "Order Divestiture"*..... 190
VIII. CONCLUSION..... 195

II. THE VALIDITY OF MAXIMUM FEASIBLE DIVERSIFICATION AS A POLICY OBJECTIVE.

"Clearly," as Chairman Burch has noted, "the media cross-ownership matter warranting the most attention is that of VHF-TV and the daily newspaper." Further notice of Proposed Rule Making in Docket No. 18110, 22 F.C.C. 2d 339, concurring and dissenting opinion of Chairman Burch. The Commission has accordingly proposed in Docket No. 18110 to adopt a rule that "would require divestiture, within five years, to reduce holdings in any market to one or more daily newspapers, or one television broadcast station, or one AM-FM combination." *Id.*, par. 34. In Docket No. 18891, meanwhile, the Commission has proposed a complementary rule prohibiting common control within the same market of a daily newspaper and a cable television system. Notice of Proposed Rule Making and of Inquiry in Docket No. 18891, released July 1, 1970, par. 4; see also Memorandum Opinion and Order in Docket No. 18891, released Dec. 8, 1970, par. 5. With respect to both of these newspaper cross-ownership matters, the Commission has rested its rule-making proposal on a policy objective of bringing about the maximum feasible diversification of control of the major communications media in each community. This objective has been challenged here in the comments filed by NAB and ANPA, in some of the supporting

studies commissioned by ANPA, and in the statement of Commissioner Wells dissenting to the issuance of the Further Notice of Proposed Rule Making. The first question to be considered, therefore, is the validity of the policy that the Commission has posited as the basis for the proposed rules.

A. The Policy As Expressed by the Commission in These Proceedings.

We may begin with the Commission's articulation of the policy. The fullest statement thus far in these proceedings is found in the First Report and Order in Docket No. 18110 (18 RR 2d 1735). The Commission there declared:

> . . . [C]entralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use. [par. 17]
>
> It is accordingly firmly established that in licensing the use of the radio spectrum for broadcasting, we are to be guided by the sound public policy of placing into many, rather than a few hands the control of this powerful medium of mass communication. . . . [par. 18]
>
> . . . . A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to

> only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated. We see no existing public interest reason for being wedded to our present policy that permits a licensee to acquire more than one station in the same area. [par. 21]

The Commission recognized the fact, which NAB and ANPA have again stressed here, that "many communities have multiple broadcast and other communications media" (par. 22). But the Commission took note of data submitted by NAB showing that "the number of cities with commercially competing local dailies" had declined by 1968 to only 45 – "a fact which increases the significance of the broadcast medium" (par. 22) – and it reiterated:

> In our view, as we have made clear above, there is no optimum degree of diversification, and we do not feel competent to say or hold that any particular number of outlets of expression is "enough." We believe that the increased amount of broadcast service now available also forms the basis for the conclusion that, with the exceptions mentioned later herein, it is no longer necessary to permit the licensing of combined operations in the same market, as was the case in the early days of broadcasting, in order to bring service to the public. [par. 22]

Also pressed upon the Commission there, as here, was the "equitable" argument based on the Commission's past licensing practices:

> It is urged that the Commission not only permitted but encouraged AM licensees to become TV licensees in their own area, . . . [and] that it is inequitable now not to permit such common ownership for it robs such owners of the fruits of their risk taking . . . . [*Ibid.*]

To which the Commission gave the simple response: "But conditions have changed, and we are obligated to change the priority of our objectives, in the public interest." *Ibid.*[1]

It is true that the Commission subsequently reconsidered and softened the "one-to-a-market" rule adopted in the First Report and Order. See Memorandum Opinion and Order in Docket No. 18110, released March 2, 1971. But in this subsequent decision the Commission not only adhered to the rule prohibiting new combinations between VHF television stations and radio stations in the same market (par. 35), but again rejected the challenges made – by NAB, among others – to the basic diversification policy as expounded in the First Report and Order. See, *e.g.*, pars. 7, 10, 18 of the Memorandum Opinion and Order on reconsideration. Thus the Commission declared (par. 20): "What we stated in . . . the First Report and Order expresses our views on the basis

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[1] *Cf.* the Commission's ruling dated May 12, 1971, on the fairness doctrine complaint involving advertisements for the F-310 gasoline additive, where the Commission announced a broad reappraisal of a policy formulated "more than two decades ago," on the basis that "the evolution of broadcasting and communications generally has been profound during this time-span" (p. 10).

and purpose of the new rules and takes into account the factors mentioned by NAB — factors which do not lessen our concern about diversity."

The objective of maximum feasible diversification was also the basis of the Commission's action in the Second Report and Order in Docket No. 18397 (19 RR 2d 1775). The Commission there adopted rules prohibiting cross-ownership between a television broadcast station and a CATV system in the same market (and between a national television network and a CATV system anywhere) and requiring divestiture to comply with the rule within three years. The Commission justified the TV-CATV rule on the basis that it "would further the Commission's policy favoring diversity of control over local communications media" (par. 12), and noted that "what is at stake is diversity to the CATV subscribing portion of the public . . . ." (par. 13). (In this ruling, as in the First Report and Order in Docket No. 18110, the Commission rejected the contention "that case-by-case consideration of alleged abuses would be preferable to general rules . . . ." (*id.*, par. 5).)

Finally, the Commission has also relied on its diversification policy in the Further Notice of Proposed Rule Making in Docket No. 18110 (22 F.C.C. 2d 339). In proposing the rule that would prohibit cross-ownership of daily newspapers and VHF television stations (or AM-FM combinations) in the same market and would require divestiture to comply with the rule within five years, the Commission said it was acting "for the purpose of promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints" (par. 33). The Commission stated:

> We have long been concerned with the particular problem of newspaper-broadcast joint control as an important factor in the overall attempt to secure diversity in the control of broadcast facilities. It has now become clear that the most significant aspect of the problem is the common control of television stations and newspapers of general circulation. For, the studies presented in this record and otherwise available are in full agreement that the public looks primarily to these two sources for its news and information on public affairs. . . . [par. 26.]

The Commission added that, "[a]s the authorities cited in paragraph 16 of the First Report and Order . . . demonstrate, control of the sources of information and views on public issues is significant even though there may be an absence of any definitive measurement of the degree to which mass communications actually influence thought and behavior." Par. 26, n. 6. The Commission went on to note, as evidence of the need for the proposed rule, that "the incidence of common ownership of television stations and newspapers is high" (par. 30). It pointed to Justice Department findings that in 34 of the top 50 markets a single owner controls a television station and at least one daily newspaper (*ibid.*), and to the Commission's own report on newspaper-television joint interests as of November 1969, which "indicates that 94 television stations are affiliated through common ownership with newspapers in the same city" (par. 31). The Commission further noted (par. 30) that such combinations frequently involve common control of a television station and more than one daily newspaper in the same city.

In sum, the rules proposed in these proceedings are based on a long-standing Commission policy which takes

"a proper objective . . . the maximum diversity of ownership that technology permits in each area." Since the Commission has made it clear that economics as well as technology must be considered as limitations on the permissible diversity (see, *e.g., Carroll Broadcasting Co. v. FCC,* 258 F.2d 440 (1958)), the policy objective may be more accurately characterized as the maximum feasible diversity in each area. This is the policy that has been challenged in the comments filed by NAB and ANPA and in some of the statements commissioned in support of those comments.

* * * *

C. Sources of the Diversification Policy.

While NAB characterizes the diversity as "a wholly gratuitous assumption that is not supported by logic, experience or empirical data" (NAB Comments, at 26), and while Commissioner Wells accuses the Commission of "revers[ing] long-standing policy by positing" diversity as a regulatory goal and of concluding "with very little analysis" that maximum diversity is desirable, the policy of seeking to achieve maximum feasible diversity is in fact compelled by the law. Since the papers filed by NAB and ANPA sedulously ignore the applicable legal authorities, it may be helpful to refer to a few of them here.[1]

1. *The Commission's own precedents.* We may start with the position the Commission itself has taken over the years on diversity of control as a goal of its regulatory policy. Examination of the Commission's precedents makes it clear that the policy stated by the Commission

[1] The legal sources of the diversification policy are set forth at greater length in my article, *Cable Television and Media Concentration*, 22 Stanford Law Review 21, 250-260 (1970).

here is the same policy the Commission has consistently drawn from the Communications Act over the past 30 years. Even in 1944, when the Commission decided "not to adopt any general rule with respect to newspaper ownership of radio stations," it simultaneously declared that "All the Commissioners agree to the general principle that diversification of control of such media is desirable." The Commission went on to promise that "it does not intend in granting licenses in the public interest to permit concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee." Public Notice in Docket No. 6051, Jan. 14, 1944, 9 F.R. 702 (printed as Attachment B to ANPA Legal Memorandum F). The 1944 statement was quoted by the Court of Appeals in 1955 as evidence of the Commission's "general policy of encouraging diverse ownership of all mass media of communication." *Clarksburg Publishing Co. v. FCC,* 225 F.2d 511, 517 & n.19 (D.C. Cir. 1955). The court continued:

> The soundness of these guides to the Commission's licensing function is not open to question. These guides, like the First Amendment, rest "on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public***." . . . This court has strongly supported the Commission's view that diversification is an important component of the public interest. [*Id.* at 518.]

While the Commission in the years since 1944 has adhered to diversification as a policy objective, it has steadily moved away from its initial reliance on ad hoc licensing decisions to implement the policy and has increasingly turned to rulemaking and general policy state-

ments instead. Thus in 1953 the Commission stated, in amending its multiple-ownership rules (which represent, of course, a "structural" rather than an *ad hoc* approach to the diversification objective):

> One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis. . . . This Commission has consistently adhered to the principle of "diversification" in order to preserve competition. . . . Simply stated, the fundamental purpose of this facet of the multiple-ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest.

Amendment of Multiple Ownership Rules, 18 Fed. Reg. 7796, 7797, 9 RR 1563, 1568 (1953). Again in 1965 the Commission, in its Policy Statement on Comparative Broadcast Hearings – another relatively "broad brush" rather than ad hoc approach to diversification – endorsed as a "primary objective" the goal of "a maximum diffusion of control of the media of mass communications." Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 394, 5 RR 2d 1901, 1908 (1965). While thus espousing the precise goal of "maximum" diversity that NAB, ANPA and Commissioner Wells find gratutious and unjustified today, the Commission in the 1965 policy statement expounded further on that policy goal:

> Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities. . . . That radio and television broadcast stations play an important role in providing news and opinion is obvious. That it is important in a free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established.

1 F.C.C. 2d 393, 394, 5 RR 2d 1901, 1908.[1]

The stance thus taken in the 1965 policy statement was strengthened, so far as its applicability here is concerned, by the Policy Statement on Comparative Hearings Involving Regular Renewal Applicants issued by the Commission in January 1970. 18 RR 2d 1901 (Jan. 15, 1970). To be sure, the Commission there virtually eliminated diversification as an issue in comparative licensing hearings involving regular renewal applicants. But the Commission brought up "our policy of diversification of the media of mass communications" and said: "We do not denigrate in any way the importance of that policy or the logic of its applicability in a comparative hearing involving new applicants." 18 RR 2d at 1907. And the Commission went on to hold, in what *was* a decisive reversal of a position it had taken in the 1944 statement, that the appropriate way to implement the diversification policy with respect to ownership combinations in individual markets was not through ad hoc proceedings but

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[1] The Commission relied on these court decisions: *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *United States* v. *Storer Broadcasting*, 351 U.S. 192 (1956); *Scripps-Howard Radio, Inc.* v. *FCC*, 189 F. 2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951).

rather through general rule-making. The Commission said: "the overall structure of the industry, so far as multiple-ownership and diversification are concerned, should be the subject of general rule making proceedings rather than ad hoc decisions in renewal hearings." *Id.* at 1907-08. And as the exemplars of this preferred approach, the Commission cited the instant rule-making proceedings. *Id.* at 1907.

The Commission has indeed been moving in recent years, through the instant proceedings, to promote its diversification policy through rule-making. In the original Notice of Proposed Rule Making in Docket No. 18110, issued more than three years ago on March 27, 1968, the Commission, in proposing the "one-to-a-market" rule, again invoked its policy objective of "maximum" diversity:

> One of the purposes of the Commission's multiple ownership rules is to promote maximum diversification of programming sources and viewpoints. It is well established that "[t]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." [Notice of Proposed Rule Making, Docket No. 18110, 33 Fed. Reg. 5315 (1968).]

The Commission has proceeded in the First Report and Order in that docket (18 RR 2d 1735), as related earlier, to adopt the rule prohibiting the formation of new radio-television combinations in the same market. Meanwhile, in the Second Report and Order in Docket No. 18397 (19 RR 2d 1775), the Commission has adopted a rule requiring the break-up within three years of combinations between television stations and cable systems within the same market, likewise in order to "further the

Commission's policy favoring diversity of control over local mass communications media" (par. 12). Finally, in the proposals here at issue, the Commission has returned to "the particular problem of newspaper-broadcast joint control as an important factor in the overall attempt to secure diversity in the control of broadcast facilities," and has recognized that "the most significant aspect of the problem is the common control of television stations and newspapers of general circulation." Further Notice of Proposed Rule Making in Docket No. 18110, 22 F.C.C. 2d 339 (par. 26). In the words of Chairman Burch, "Here then are the guts of the matter."

The instant rule-making proposals thus emerge from a background of more than 25 years in which the Commission has consistently professed adherence to the goal of media diversification, and of several years in which the Commission has espoused and partially implemented a policy of pursuing that objective through general rule-making rather than ad hoc licensing proceedings. Given that background, it is difficult to see how the Commission could seriously entertain at this date the NAB-ANPA position that the diversity objective is fundamentally spurious. It is no less difficult to see – as will be further explained below – how the Commission at this date could responsibly entertain the NAB-ANPA position that the objective of diversification, if it is to be pursued at all, should be pursued through ad hoc listening rather than through general rule-making proceedings.

2. *The decisions of the courts.* The position taken by the Commission itself over the years is not the only refutation of the NAB-ANPA attack on media diversity as a policy objective. One might point, for example, to the view of such a distinguished commentator as Professor Louis L. Jaffe, who has declared, even while support-

ing a cause championed by NAB, that "The objective of diversifying the media is absolutely sound . . . ." Jaffe, *We Need the Pastore Bill,* The New Republic, Dec. 6, 1969, at 14, 15. But there is an even more authoritative source. While it would be difficult to glean the fact from the papers filed here by NAB and ANPA, the diversification policy has frequently been the subject of decisions by the courts. The Supreme Court has declared that Congress in adopting the Communications Act "moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940), quoted in *Red Lion Broadcasting Co.* v. FCC, 395 U.S. 367, 395 (1969). Even more significant, perhaps, is what the Supreme Court has said concerning the impact of another source of the diversification policy, the First Amendment. In its 1945 decision in the *Associated Press* case, the Court articulated a First Amendment principle which it has often repeated since and which the Commission has often relied on, though it is religiously ignored here by NAB and ANPA. The Court said of the First Amendment:

> That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. [*Associated Press v. United States,* 326 U.S. 1, 20 (1945), quoted in, *e.g., Citizen Publishing Co. v. United States,* 394 U.S. 131, 139-40 (1969).] [1]

[1] See also the similar declaration by Judge Learned Hand in his trial-court opinion in the *Associated Press* case, stating that the

[footnote continued]

In the original notice of rule making in this very proceeding, the Commission itself, as already noted, has relied on the "well established" doctrine of the *Associated Press* case as a basis for its policy of promoting "maximum diversification of programing sources and viewpoints." Notice of Proposed Rule Making, Docket No. 18110, 33 Fed. Reg. 5315 (1968) quoted at page 31 *supra.*[2]

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newspaper industry—and the same is true, of course, of the broadcast industry—

> . . . serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

52 F. Supp. 363, 272 (S.D. N.Y. 1943). Judge Hand's statement has often been quoted with approval by the Supreme Court. *E.g., Tinker* v. *Des Moines* School District, 393 U.S. 503, 512 (1969); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

[2] The statement by Mr. Justice Black in the *Associated Press* case is quoted in the opening paragraph of the recent report of Canada's Special Senate Committee on Mass Media. The Report continues:

> This notion is basic to our idea of a free society. The more separate voices we have telling us what's going on, telling us how we're doing, telling us how we *should* be doing, the more effectively we can govern ourselves. In this sense, the mass media are society's suggestion box. The more suggestions there are from below, the better will be the decisions to be made at the top. This assumption is not limited to parliamentary democracies. The desire to have a voice in ordering the institutions that govern our lives is a universal human constant, from classroom to corporation, from neighborhood to empire. And in a technological society, the media are one of the chief instruments by which this need is met.

"The Uncertain Mirror," Report of the Special Senate Committee on Mass Media, Vol. I (1970), at 3.

The pronouncements in the *Associated Press* case provide an illuminating comparison with the positions taken here by the opponents of the proposed rules. While neither the Supreme Court nor Judge Hand used the word "maximum" to characterize the media diversity that is the objective of the First Amendment, the Court spoke of "the *widest possible* dissemination of information from diverse and antagonistic sources," and Judge Hand of "the dissemination of news from *as many different sources*, and with *as many different facets and colors as is possible.*" (emphasis added). See page 34 note 1 supra. If that is not square support for the Commission's stated objective of "maximum diversification of programing sources and viewpoints," it is difficult to imagine what would be. In short, the objective is squarely supported by both the Communications Act and the First Amendment, and this fact has been consistently recognized by both the Commission and the Supreme Court.

Other judicial decisions are in accord. In *Red Lion* the Supreme Court declared,

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 391 (1969). The Court accordingly rejected the claim of broadcast licensees to monopolize the "scarce resource" (367 U.S. at 391) of a broadcast frequency as against the obligations imposed by the Commission's Fairness Doctrine – obligations which in the Court's view "enhance rather than abridge the freedoms of speech and press

protected by the First Amendment." *Id.* at 375. If the First Amendment freedoms are thus enhanced by application of the Fairness Doctrine to prevent monopolization of even a single radio or television channel, they will be at least as strongly promoted by application of the rules proposed here to prevent common control of *two* of the chief communications channels – a daily newspaper on the one hand and a television station or cable system on the other – in the community. Further support for this conclusion is found in the final footnote to the *Red Lion* opinion. The Court there went out of its way to suggest, though it did not decide, that

> . . . quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. [395 U.S. at 401 n. 28.]

The Court thereupon cited *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), where it had declared that restraints eliminating competition between two daily newspapers in the same city "comport neither with the antitrust laws nor with the First Amendment." *Id.* at 139. Applying these considerations to the media facilities involved in the present rule-making proposals, one finds that (1) television stations (and AM-FM combinations as well) are still affected by a "technological scarcity" of frequencies, as the Court expressly held in *Red Lion* (395 U.S. at 396-400), and by an economic scarcity as well; (2) daily newspapers are affected by an economic scarcity, as indicated by their monopoly posi-

tion in almost all markets and as recognized by Congress itself in recent legislation to be discussed below; and (3) cable systems, with their likely monopoly position in their market, are characterized by a compelling scarcity of both an economic and a regulatory nature. The Commission's present proposals to prohibit newspaper-television and newspaper-cable combinations in the same market are thus perfect examples of governmental measures designed, in the words of the Supreme Court in *Red Lion*, to "limit or dissipate the power of those who sit astride the channels of communication with the general public."

Other judicial decisions likewise support the Commission's policy of promoting "maximum diversification" of the major media within each area. In 1951 the Court of Appeals, in sustaining the Commission's decision in a comparative licensing proceeding against the applicant who owned a daily newspaper in the same city, did so on the basis of the *Associated Press* principle favoring "the widest possible dissemination of information from diverse and antagonistic sources." After quoting the Supreme Court's statement, the Court of Appeals continued:

> While uttered in a different context, this thought is the key to the present question. Inherent in the thought is the realization that news communicated to the public is subject to selection and, through selection, to editing, and that in addition there may be diversity in method, manner and emphasis of presentation. Such variations may arise from numerous causes. In considering the public interest the Commission is well within the law when, in choosing between two applications, it attaches significance to the fact that one, in contrast with the other, is dissociated from existing media of mass communication in the area affected.

Scripps-Howard Radio, Inc. v. FCC, 189 F. 2d 677, 683 (D.C. Cir. 1951); see also *McClatchy Broadcasting Co. v. FCC*, 239 F. 2d 15, 18 (D.C. Cir. 1956). The present proceedings, of course, also present "a different context," that of rule-making proposals. But the basic policy objective of maximum diversification of control among the major media voices in a market, and among the daily newspapers and television stations in particular, is the same objective that was upheld by the Court of Appeals in the *Scripps-Howard* and *McClatchy* cases.[1] It is the same objective that was endorsed in *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955), where the court, again quoting *Associated Press*, pointed out that "This court has strongly supported the Commission's view that diversification is an important component of the public interest." *Id.* at 518. It is the same objective that the court more recently endorsed with the declaration that "The public welfare requires the Commission to provide the 'widest possible dissemination of

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[1] The *Scripps-Howard* case arose from Cleveland and involved only an AM license. It is noteworthy that if one simply counted the media voices in Cleveland—the kind of approach on which NAB relies so heavily here and which it claims to be a new revelation (see NAB Comments, at 16-19, and the NAB-commissioned Seiden study, "Mass Communications in the United States—1970, Summary Volume")—one could count quite a few. As the Court of Appeals stated, there were then "located in Cleveland five AM broadcast stations as well as two daily newspapers and a large number of other publications with which [the newspaper owning applicant] had no connection. . . ." 189 F. 2d at 683. Nonetheless, the Commission applied its diversification policy to deny the license to the newspaper owner, and the Court of Appeals upheld this. (It is also noteworthy, and typical, that while Cleveland then had three daily newspaper publishers, it now has only two.)

information from diverse and antagonistic sources' and to guard against undue concentration of control of communications power'." *Joseph v. FCC*, 404 F.2d 207, 211 (D.C. Cir. 1968). In sum, it is an objective which, far from being the "wholly gratuitous" and "false" proposition that NAB asserts it to be (NAB Comments, at 26, 39), stands firmly on judicial authority.

Fresh support for the diversity objective and new confirmation of its constitutional underpinnings is found in three recent decisions of the courts of appeals. In *National Association of Theatre Owners v. FCC*, 17 RR 2d 2010 (D.C. Cir. 1969), the court significantly extended the theory of the *Associated Press* and *Red Lion* opinions. It did this by suggesting that the Commission is not only permitted, but compelled, to take action to promote the objectives of the First Amendment by broadening the range of diversity among the major communications media. As the court put it, "the Commission *must* seek to assure that the listening and viewing public will be exposed to a wide variety of 'social, political, esthetic, moral, and other ideas and experiences'," so as to "provide the broadcasting media with the diversity *demanded* by the First Amendment. . . ." *Id.* at 2027-28 (emphasis added). Even more recently, the Court of Appeals for the Second Circuit has upheld the Commission's "prime time access" rule in part on the same basis. After quoting *Associated Press* and *Red Lion*, the court declared:

> When viewed in the light of these principles, the prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the "[d]iversity of programs and development of diverse and antagonistic sources of program service" and to correct a situation where "[o]nly three organizations control access to the crucial prime time evening television schedule."

Mt. Mansfield Television, Inc. v. FCC, United States Court of Appeals for the Second Circuit, decided May 3, 1971, slip opinion at 2785. Finally, there is the highly pertinent decision in *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970), which will be dealt with at greater length elsewhere in these comments. It may be noted here that the concurring opinion of Judge Tamm again recognizes the impact of the First Amendment – and of the antitrust laws as well – in compelling application of the Commission's diversification policy to concentrations of control involving newspaper-broadcast combinations at the local level, inasmuch as "concentration in control of the mass media is certainly an issue of paramount importance, touching on fundamental national policies." 425 F.2d at 560-62, 564, 566.

In sum, the Commission's long-held policy of promoting the maximum feasible diversification of media control within particular markets is far from being a "false" and "gratuitous" proposition as asserted by NAB. It is solidly rooted in the Communications Act and the First Amendment, and its validity has been consistently confirmed by both the Commission and the courts.[1]

* * *

[1] It follows, of course, that there is no merit to the argument (see, *e.g.*, ANPA Comments, at 27-32; ANPA Professional Studies, at C-35) that the rules proposed in these proceedings would violate the First Amendment. See, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1, 20 (1969); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375, 386-401 (1969); *National Ass'n of Theatre Owners* v. *FCC*, 17 RR 2d 2010, 2027-2028 (1969).

IV. THE ALTERNATIVE OF DEALING WITH ALLEGED UNDUE CONCENTRATION THROUGH AD HOC LICENSING DECISIONS INSTEAD OF RULE MAKING.

ANPA and its consultants have argued, and NAB appears to agree, that the Commission should not adopt the proposed rules because it can better deal with the issues of media concentration through the "ad hoc" approach of individual licensing proceedings. Thus ANPA devotes an entire argument to the proposition that "The Commission's Asserted Objectives of Promoting Diversification of Viewpoints and Economic Competition in Local Markets Can Best Be Achieved on an Ad Hoc Basis." ANPA Comments, at 54, 54-58. As ANPA sees it,

> the primary defect of the Commission's proposed rule is its failure to take into account the variable and often unique conditions prevailing in individual local markets. No two broadcast or newspaper markets in the United States are identical. Each market has its own distinct geographical, social, and economic characteristics, and any attempt by the Commission to fashion a rule of general applicability in an area so peculiarly dependent on the facts of each situation is fore-doomed to failure. [*Id.* at 54.]

ANPA asserts that up to now "the Commission has vigorously applied its diversification policy in individual licensing proceedings involving newspaper applicants," and that "by recognizing the unique characteristics prevailing in each local market, the flexible procedures previously followed by the Commission have been ideally designed to serve the public interest." *Id.* at 55-56. Professor Udell likewise states, "I wholeheartedly agree with the Commission's historic policy of treating the question of

whether or not a television station should be owned by a local newspaper on a case-by-case basis." ANPA Professional Studies, at D-29. "What is socially desirable will depend upon the specific factors of each situation. Therefore, an individual analysis is required," Professor Udell adds. *Id.* at D-32. ANPA makes the same argument in Docket No. 18891:

> A rule of general applicability is plainly an inappropriate response to the problem of undue concentration of control of the media of mass communication. As the Commission has consistently recognized, the question of undue concentration can only be resolved on a case-by-case basis which takes into account differences in local conditions. [ANPA Comments in Docket No. 18891, at 19.]

Such a case-by-case approach, at least with respect to newspaper-CATV combinations, apparently has the support of at least one member of the Commission. Commissioner Robert E. Lee stated in his dissent from the Notice in Docket No. 18891: "I believe that such matters are better considered on a case-by-case basis and we should not consider barring a class of owners, such as newspapers, from CATV ownership in the same city."

An ad hoc approach to local media concentration may sound attractive in the abstract. The way it would work in practice may be less pleasing, for both the Commission and the affected licensees. In this part of these comments I propose to examine in some detail the ad hoc alternative, in an effort to see how it would work and what implications it would have for the Commission's licensing function. It is necessary to distinguish at the outset, however, between two types of issues involving local media concentration that may be presented to the Commission. One is the issue of *undue concentration*

per se; the other is the issue of *abuses* of media concentration. So far as the second issue is concerned, an ad hoc approach to "alleged abuses resulting from newspaper ownership" has been supported by ANPA (ANPA Comments, at 56) and also by Commissioner Wells. In his dissent to the First Report and Order in Docket No. 18110, Commissioner Wells stated:

> . . . [W]e have an ample arsenal of regulatory powers to deal with abuses as they arise. We hesitate to use these powers to fashion specific remedies for specific abuses, however, choosing instead to adopt a blanket rule. I had assumed that we have been given considerable discretion in regulating the industry so that we could meet such abuses on a case-by-case basis. [18 RR 2d at 1762.]

The desirability of an ad hoc approach to alleged abuses of concentration will be considered in Part V of these comments (along with the question whether there is any evidence that such abuses exist). But undue concentration per se is a different issue, and it is necessary to consider separately the suitability of the ad hoc approach for dealing with it. That is what I propose to do now.

A. Must the Commission Consider "Undue Concentration Per Se" in the Absence of Alleged Abuses?

First, however, the question arises whether there really are two separate issues – whether there really is an issue of "undue concentration per se" that the Commission would have to determine through ad hoc adjudications, even in the absence of alleged abuses, if it failed to adopt the proposed rules. Commissioner Wells apparently takes the view that there is not. The thrust of his dissent in Docket No. 18110, quoted above, appears to be that the Commission should not concern itself with media combinations that are permitted by the existing multiple-ownership rules except in cases where "specific abuses" are alleged. This is also the position of Professor Udell (ANPA Professional Studies, at D-29, D-40), and it is doubtless the preferred position of ANPA itself (see, *e.g.*, ANPA Comments, at 9). It may also be the position of NAB, although NAB apparently does not concede that the Commission should concern itself with local media concentration even through the case-by-case approach and even when specific abuses are alleged.

But the question is not an open one. The Commission has long recognized, as have the courts, that undue concentration is an essential issue even though the combination in question does not offend the existing ownership rules and even though no specific abuses are alleged. This is what the Commission unanimously said in the 1944 Notice, relied on by NAB and ANPA, in which it terminated the early inquiry into newspaper ownership of radio stations. See ANPA Legal Memoranda, Memorandum F, Attachment B. The Commission said it "does not intend in granting licenses in the public interest to permit concentration of control in the hands of the few to the exclusion of the many . . . ." (*ibid.*); it did not say it would avoid "concentration of control in the hands of the few . . ." only in cases where such concentration was shown to have produced specific abuses.[1]

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[1] The majority of the Commission was merely reiterating this position when, in the First Report and Order in Docket No. 18110, it based the decision to prohibit television-radio combinations in the same market on the considerations that

> . . . [C]centralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use.

[footnote continued]

The Commission's duty to consider the issue of undue concentration per se would seem to be established by Section 309(e) of the Communications Act and the applicable Commission regulations. Section 73.636 (a)(2) of the regulations provides that no license for a television station will be granted

> . . . if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with the public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of area served, the number of people served, and the extent of other competitive service to the area in question. Only then does the regulation go on to state that the Commission "will in any event consider that there would be such a concentration of control" if the grant would be inconsistent with the multiple-ownership rules. 47 C.F.R. Sec. 73.636 (a) (2). The text of the regulation is thus inconsistent with the claim that the issue of undue concentration is automatically out

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> . . . . [T]he governing consideration here is power, and power can be realistically tempered on a structural basis. It is therefore no answer to the problem to insist upon a finding of some specific improper conduct or practice. The effects of joint ownership are likely in any event to be so intangible as not to be susceptible of precise definition. The law is clear that specific findings of improper harmful conduct are not a necessary element in Commission action in this area, and that remedial action need not await the feared result. [18 RR 2d at 1740, 1741 (pars. 17, 20).]

See also Second Report and Order in Docket No. 18397, 19 RR 2d 1775, 1777 (par. 5).

> of the case if there is no conflict with the ownership rules and no allegation of specific abuse.[1]

That the Commission must concern itself with undue concentration per se, and that it will have to do so on a case-by-case basis if it abandons the proposed rules, is shown also by the fact that the Commission *has* been doing so. Even during the pendency of these rule-making proceedings, which the Commission has relied on as a justification for not pursuing the ad hoc approach as vigorously as it otherwise might, the Commission has felt compelled to order a number of hearings – apart from comparative hearings – into alleged undue concentration unaccompanied by allegations of specific abuses.[1] In one case involving a renewal application – for the only television station in Cheyenne, Wyoming, whose licensee also controls the daily newspapers, an AM and FM, and the CATV system in Cheyenne – the Commission has ordered such a hearing. *Frontier Broadcasting Co.*, 21 F.C.C. 2d 570 (1970). It has done so on

[1] Of course, the regulation provides for dealing on an ad hoc basis with undue concentration that does not offend the existing multiple-ownership rules. The issue here, however, is whether the existing rules should be expanded–whether they should reach, in particular, newspaper-television combinations in the same market. In examining that issue the question is posed whether rule making or adjudication is the better approach for dealing with such combinations. In examining *that* question it is important to recognize that, whichever approach is chosen, the combinations must be dealt with in terms of "undue concentration per se" and not merely in terms of alleged abuses. The regulation establishes this.

[1] ANPA appears to concede that the Commission must undertake inquiries in such cases and may not limit itself to cases of alleged abuses: "As the Commission has consistently recognized, the question of undue concentration can only be resolved on a case-by-case basis which takes into account differences in local conditions." ANPA Comments in Docket No. 18891, at 19.

transfer applications involving control of an FM station by a daily newspaper publisher in Chicago, *Gale Broadcasting Co.*, 15 RR 2d 337, 341 (1969); of an AM station by the local newspaper publisher in Smyrna, Georgia, *Jonquil Broadcasting Co.*, 18 RR 2d 243, 19 RR 2d 131 (1970)[2]; and a VHF station in Wichita-Hutchinson, Kansas, by a regional media combination. *Wichita-Hutchinson Co.*, 17 RR 2d 192 (1969). The Commission reportedly was also prepared to order such a hearing on a transfer application for control of a VHF station by the local newspaper publisher in Beaumont, Texas. See Memorandum of the Department of Justice in Opposition to the Application for Transfer by Beaumont Broadcasting Corp., File No. BTC-5553 (May 8, 1968); see *Broadcasting*, Aug. 12, 1968, at 61. The Commission has also designated for hearing on the issue of undue concentration at least three uncontested applications for construction permits. It did so on an application for a new FM station filed by the local newspaper publisher in Middlesboro, Kentucky. *Cumberland Gap Broadcasting Co.* (FCC April 8, 1969).[3] In two other cases where it did so, the Commission explicitly recognized its duty to deal with the issue of undue concentration per se. In denying reconsideration of its hearing order on the uncontested application by the local newspaper publisher for a new FM station in Billings, Montana, the Commission declared:

> Contrary to Lee's claim, the Commission's ownership rules . . . do not constitute a blanket authorization for any party to acquire the maximum number of broadcast holdings in the type of situation before us where the problem of possible undue control results, at least in part, from ownership of non-broadcast media.

[2]The examiner's initial decision has disapproved the transfer. 22 RR 2d 441 (1971).

[3]The initial decision approved the application. 24 F.C.C. 2d 393 (1970).

Lee Enterprises, Inc., 16 RR 904, 905 (1969).[1] In similarly denying reconsideration of its hearings order on the uncontested application by the local newspaper publisher for a new FM station in Fort Smith, Arkansas, the Commission said:

> . . . [W]e must also point out that whether or not the Commission has generally specified local concentration of control issues on its own motion is entirely irrelevant, inasmuch as we have a responsibility under the law to specify such an issue whenever the facts warrant it, regardless of whether a petition to deny has been filed.

American Television Co., 12 F.C.C. 2d 518, 521 (1968).[2]

The Commission's duty to apply the policy against undue concentration aside from the application of the multiple-ownership rules, and aside from allegations of specific abuses, has also been recognized by the courts. The Supreme Court said as much in its dictum in the *RCA* case.[3] And the Court of Appeals so held as long

[1]The initial decision approved the application. *Broadcasting*, April 20, 1970, at 41.

[2]See also *Elyria-Lorain Broadcasting Co.*, 6 RR 2d 191 (1965) (initial decision approving transfer at 5 F.C.C. 2d 231 (1966)); *Huntingdon Broadcasters, Inc.*, 6 RR 2d 428 (1965) (initial decision approving application at 5 F.C.C 2d 246 (1966)); *Miami Broadcasting Co.*, 1 RR 2d 43 (1963).

[3]"Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard

[footnote continued]

ago as 1955 in *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955). The Commission there had granted a construction permit for a new television station in Clarksburg, West Virginia, to a company which, while it did not own the newspaper in Clarksburg, owned a number of other newspapers and broadcast stations in that part of West Virginia. The Court of Appeals set aside the Commission's action on the ground, among others, of undue concentration per se:

> . . . [I]t is difficult to understand how the Commission could have concluded that the grant would not result "in an unlawful concentration of control or in a monopoly of the media for mass communications in the West Virginia area." . . .
>
> Nothing in the present protest record dispels the strong impression that, on the concentration of control issue alone, the grant would not be in the public interest. . . . [225 F.2d at 519.]

More recently, the Court of Appeals set aside the Commission's original grant of the transfer application for the Chicago FM station because of its failure to hold a hearing or make a finding on the issue of undue concentration. *Joseph v. FCC*, 404 F.2d 207, 212 (D.C. Cir. 1968). And in *Hale v. FCC* the court, while affirming – out of deference to this rule-making proceeding – the Commission's refusal to order a hearing on the renewal application for station KSL-AM in Salt Lake City, made very clear its view that the concentration alleged to exist in Salt Lake City, even though it did not violate the

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from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communications." *United States* v. *RCA*, 358 U.S. 334, 351-52 (1959) (dictum).

multiple-ownership rules and even though it had not attracted substantial allegations of specific abuses, was nonetheless a proper and indeed necessary subject for the Commission's consideration and action. See 425 F.2d 556, 560.

The law is clear, then, that the Commission must consider, as part of the "public interest" determination required by Section 309 (a) of the Communications Act, whether the renewal of a television license held by the publisher of the daily newspaper in the same city will result in an undue concentration of media control. And this consideration may not be limited, as Commissioner Wells suggests, to cases involving allegations of specific abuses on the part of the media combination. The question here is whether the Commission should deal with the issue through a rule-making approach, such as the proposed rule that would lead to the dissolution of newspaper-television combinations in all markets (absent an ad hoc showing that a particular combination should be allowed to continue), or through the ad hoc licensing approach urged by ANPA. I shall now examine some of the implications and consequences that could be expected to result from a decision to abandon the proposed rules and pursue the ad hoc approach instead.

* * *

VI. THE IMPACT OF LOCAL-NEWSPAPER OWNERSHIP ON BROADCAST EDITORIALIZING

Affiliation with a local newspaper also appears to deter broadcast stations from editorializing. This is not an "abuse," since the Commission does not (and probably should not) require stations to editorialize. But it is inconsistent with the policy espoused by the Commission and endorsed by the Court of Appeals, which is to en-

courage editorializing. And it deprives the public in many cities of the benefits to be derived from having the affected TV stations, and radio stations as well, add their important voices to the diversity of public debate.

I am aware of no definitive data showing the percentages of broadcast stations that regularly editorialize as between stations owned by local newspapers and stations not so owned. Strong evidence, however, points to the conclusion that the percentage of the latter group is larger. Litwin inquired into the subject and, on the basis of his interviews with owners, managers, and top professional staff of 30 broadcast stations and newspapers (see Further Notice in Docket No. 18110, par. 25), found significant differences between singly-owned and commonly-owned media in responses to a multi-part question on editorializing. See Litwin Study at 5-10; *id.*, Appendix C, at 3. On controversies involving "political questions, candidates," 64 percent of the personnel from singly-owned media reported taking editorial stands as against 47 percent from the commonly-owned media; on "violence," the percentages were 59 and 50; on "obscenity," 60 and 43; and "on smoking," the difference is striking: 52% of single ownership personnel report taking a stand on smoking versus 17% of common ownership personnel" Id. at 511.[1] These results are

[1] Litwin's two categories do not isolate the newspaper-ownership question, since he defined "common ownership" as including multiple-broadcast as well as newspaper-broadcast combinations. But the separation of TV-radio as well as newspaper-broadcast combinations is at issue in this proceeding, and in any event it seems likely, as will be seen, that the same considerations tending to discourage editorializing would operate with respect to both kinds of combinations. It is also true that this is one of the factual questions on which Litwin probably would have done better, as the

[footnote continued]

in accord with evidence that stations affiliated with a local newspaper may refrain from editorializing precisely because of that affiliation and a desire to protect it from criticism. Litwin found such a motive operating in "Big Town" (Baltimore) on the part of the TV and radio stations owned by the "Foot Corporation" (which is evidently Hearst, owner of a newspaper-AM-FM-TV combination in Baltimore). He reports that "[t]he TV and radio stations do not editorialize because, first, they don't feel it is their role to make judgments on public issues, and second, they want to avoid any talk of 'collusion' in the policies of the broadcast and print operations." Litwin Study, at 7-4.[1] Reliance on non-editorializing as a shield against "talk of collusion" or

Commission has pointed out, to consult documentary sources such as the station log rather than rely on interview responses. See First Report and Order, par. 37; Memorandum Opinion and Order on reconsideration, par. 25. The question as to editorializing, however, is one to which the interviewees could be expected to provide reliable answers. Not only is it something they would know, but, more important, it is something as to which the pro-station bias built into the interview sample (see *id.*, par. 25) would probably not be operative. The latter inference is confirmed by the results showing greater editorializing by single owners, a tendency that Litwin was then compelled to attack as "a potentially dangerous situation" (Litwin Study, at 5-11). See First Report and Order, par. 40; Barnett, 22 Stan. L. Rev. at 267 n. 252.

[1] Of course, not all stations under local-newspaper ownership have policies against editorializing. In Baltimore itself Litwin reports that the stations licensed to the "Head Corporation" (the Baltimore Sun) do editorialize. He adds:

> There is no sharing of editorial policy between the newspaper and the TV or radio stations, but usually their policies and stands agree ("Given the same set of facts it's not surprising that rational men reach the same conclusions.") Occasionally, they take different and opposing stands on public issues; for instance, recommendations on referendum issues. [*Id* at 7-4].

other attacks on newspaper ownership was also apparent in the *WHDH* case. As the Commission there stated:

> Although conceding that it has never editorialized, WHDH contends that this is a factor which minimizes any question of concentration of control flowing from the common ownership of newspaper and broadcast interests. We disagree with this contention. . . . [*WHDH, Inc.*, 15 RR 2d 411, 427 (1969).]

If broadcast stations owned by local newspapers are indeed less likely to editorialize than stations not so owned, their reluctance is understandable. One of the effects of such cross-ownership is, precisely, to create a danger in editorializing. The danger is real. As the Court of Appeals pointed out in the *WHDH* case, "It can readily be discerned that aggressive editorializing by WHDH would have provided its rivals with ammunition." *Greater Boston Television Corp. v. FCC*, 20 RR 2d 2052, 2076 (D.C. Cir. 1970). In the specification order for the hearing that was never held in the *WCCO* case, the Commission specified an issue as to "Whether the editorial and commentary treatment of public affairs by WCCO and WCCO-TV has been the same or substantially similar to that of other media with which the stations are directly or indirectly affiliated." *Midwest Radio-Television, Inc.*, 17 F.C.C. 2d 290, 292 (1969). The same issue was specified in the *Chronicle* case (17 F.C.C. 2d 245, 247), but the upshot was a demonstration of the protection a newspaper-affiliated station can indeed gain from refusing to editorialize. The hearing examiner found: "Neither the TV nor the FM station made a practice of editorializing during the last license renewal period. Hence, no findings can be formulated as to any correlation between their editorial positions and those of

other Chronicle-related outlets." 21 RR 2d 245, 253. In sum, stations owned by local newspapers have an interest in not editorializing, and there is good reason to believe they tend to act accordingly.

The question remains whether this is an effect the Commission should consider contrary to the public interest and hence a reason for adopting the rules here proposed. In the pending comparative proceeding over the license for newspaper-owned WTAR-TV in Norfolk, the Review Board in 1970 rejected the challenger's request for addition of a separate issue on the incumbent licensee's "alleged failure to editorialize," on the ground that ". . . Commission policy does not impose a duty upon the licensee to editorialize on its station . . . ." *WTAR Radio-TV Corp.*, 19 RR 2d 661, 682 (1970). It is true that the Commission imposes no such duty, and the Board's refusal to add the editorializing issue may have been correct. Yet it may also be true that the Commission's policy – and *public* policy, as embodied in the Communications Act and the First Amendment – favors editorializing and stands opposed to structural arrangements that inherently discourage it. Even in the 1949 report on *Editorializing by Broadcast Licensees*, where it first approved editorializing, the Commission appeared to be not merely neutral but favorably inclined toward the practice:

> The Commission is not persuaded that a station's willingness to stand up and be counted on these particular issues upon which the licensee has a definite position may not be actually helpful in providing and maintaining a climate of fairness and equal opportunity for the expression of contrary views. Certainly the public has less to fear from the open partisan than from the covert propagandist. . . . [13 F.C.C. 1246, 1254 (1949).]

Over the past twenty-two years editorializing has grown steadily, to the point where editorials are now broadcast, at least occasionally, by nearly 50 percent of AM and TV stations.[1] The Commission, meanwhile, has been confirmed in its approval of the practice and now flatly encourages it:

"The Commission encourages broadcasters to editorialize on issues of interest to their communities subject, however, to the requirements of the fairness doctrine." *National Ass'n of Theater Owners of Indiana*, 19 RR 2d 799, 800 (1970); see also *Obligations of Broadcast Licensees Under the Fairness Doctrine*, Docket No. 18859, May 18, 1970, pars. 7, 8.[1]

In the *WHDH* case, moreover, both the Commission and the Court of Appeals indicated that a policy against editorializing on the part of a newspaper-owned station will be counted against it in a comparative proceeding. It will have this effect, the opinions indicate, not only in the sense of failing to blunt the diversification issue, but also as an affirmative demerit on that issue.[2] Thus the Commission declared:

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[1] According to a survey by Broadcasting Yearbook, the percentages in 1970 were 48.8% of AM stations, 49.9% of TV stations, and 34.8% of FM's, *1971 Broadcasting Yearbook*, at 66. (The source gives the TV percentage as 25.9%, but this is obviously a misprint, as the figures are 180 stations editorializing out of 361 responding, and the source itself describes the result as "nearly 50%." *Ibid*. For 1969 the comparable results were 48.5% of AM's, 48.8% of TV's, and 36.5% of FM's, *1970 Broadcasting Yearbook*, at 22.)

[1] The Commission's approval is shared on Capitol Hill. "Senator Jacob Javits (R-N.Y.) urged broadcasters last week to editorialize more and 'continue to be bold and as muckraking as you wish to be'." *Broadcasting*, July 26, 1971, at 40.

[2] This is not necessarily inconsistent with the Review Board's refusal to add a separate issue on the alleged failure to editorialize

[footnote continued]

> Although conceding that it has never editorialized, WHDH contends that this is a factor which minimizes any question of concentration of control flowing from the common ownership of newspaper and broadcast interests. We disagree with this contention. Licensees have an obligation to devote a reasonable amount of their broadcast time to the presentation of programs on controversial issues of public importance to their communities. Editorializing by Broadcasting Licensees, [citation omitted]. *If anything, the failure to editorialize demonstrates the wisdom of the Commission's policy in favor of a maximum diffusion of control of the media of mass communications. [WHDH, Inc.*, 15 RR 2d 411, 427 (1969) (emphasis added).]

The Court of Appeals, in affirming, expressed its own view that there is a public interest in broadcast editorializing. Further, the court held that failure to editorialize is a ground on which a newspaper-owned license applicant may be "penalized" in a comparative proceeding:

> The Commission need not be confined to the technique of exercising regulatory surveillance to assure that licensees will discharge duties imposed on them, perhaps grudgingly and perhaps to the

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in the *WTAR* case. 19 RR 2d at 682-83. The Review Board stipulated that this and other rulings did "not encompass a determination of whether such matters are relevant to the comparative issue in this proceeding." *Id*. at 685 n. 39. Also, the Review Board excluded from that proceeding a diversification issue such as was involved in the *WHDH* case (see *id*. at 669-74), a ruling that was based on the *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants* and that must now be reversed in the light of *Citizens Communications Center* v. *FCC*, 22 RR 2d 2001 (D.C. Cir. 1971).

minimum required. It may also seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage and expand diversity of approach and viewpoint.

Further, as the Commission pointed out, its concept of the public interest contemplated initiating of editorials by licensees. This embraces selection of topics for probing, and emphasis given to topics, as well as fairness in presentation of views on each topic. There is a public interest in diversity in policy areas lit by the lantern of editorial probes, and for that matter by reportorial assignments and coverage.

WHDH complained it was wrongfully penalized for failure to editorialize. And it can readily be discerned that aggressive editorializing by WHDH would have provided its rivals with ammunition. This does not undermine the Commission's opinion; it rather underlines the inherent difficulty confronting the affiliate of a newspaper, at least one seeking a new license. [*Greater Boston Television Corp. v. FCC*, 20 RR 2d 2052, 2076 (D.C. Cir. 1970).]

Thus, the Commission's "concept of the public interest contemplate(s) initiating of editorials by licensees"; the Commission has approved the practice since 1949 and now affirmatively encourages it; and the Court of Appeals agrees that "[t] there is a public interest in diversity in policy areas lit by the lantern of editorial probes . . . ." And surely this is right. The public's First Amendment interest in "the widest possible dissemination of information from diverse and antagonistic voices"

is curtailed when broadcast stations, and especially TV stations with their enormous audiences, withhold their own voices from the public debate. The editorial views of broadcast stations are likely to be responsible and carefully considered; and the development of newspaper monopoly in almost all cities has considerably increased the need for editorial expressions by the other important media outlets in the community. Moreover, under the fairness doctrine broadcast editorials create the opportunity for responsible spokesmen to express opposing views over the station's facilities, and thus make a uniquely effective contribution to the "marketplace of ideas." See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In response to the *Red Lion* decision, the Commission has proposed to extend the fairness doctrine by requiring licensees to make an affirmative effort to solicit opposing views in response to editorials; the Commission describes its proposal as "a modest further step in promoting access to the broadcast media, and one that is clearly called for in light of the policy of the Act." *Obligations of Broadcast Licensees under the Fairness Doctrine*, May 18, 1970, par. 8; see also pars. 7, 10. The objective there pursued can scarcely be attained if broadcasters refuse to editorialize in the first place.[1] An even more modest "further step in promoting access to the media," and likewise "one that is clearly called for in light of the policy of the Act," would be to terminate ownership structures whose inherent tendency is to deter broadcast editorializing.

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[1] See *Citizens Communications Center* v. *FCC*, 22 RR 2d 2001, 2020 (D.C. Cir. 1971): "Indeed, the failure to promote the full exercise of First Amendment freedoms through the broadcast medium may be a consideration against license renewal."

There is a special reason why the effect of local-newspaper affiliation on a station's willingness to editorialize is harmful to the public, and why it cannot be defended on the basis that the Commission imposes no duty to editorialize. This is because the inhibition operates on an *a priori*, across-the-board basis. It creates in the licensee a private interest in withholding its own opinion regardless of the issue involved, regardless of the strength of the opinion the licensee in fact holds on the issue, and regardless of the licensee's view that it is in the public interest for the opinion to be expressed. The Commission in its 1949 report spoke of the appropriateness of editorializing in cases "where the licensee, himself, believes strongly that one side of a controversial issue is correct and should prevail," and also of "a station's willingness to stand up and be counted on these particular issues upon which the licensee has a definite position. . . ." 13 F.C.C. at 1254. The Commission declared, "[i]t is not a sufficient answer to state that a licensee *should* occupy the position of an impartial umpire, where the licensee is *in fact* partial" (emphasis in original), and added, "[c]ertainly the public has less to fear from the open partisan than from the covert propagandist." *Ibid.* Newspaper affiliation gives the licensee an interest in declining to editorialize, in order to avoid "provid[ing] its rivals with ammunition," even in cases where the licensee "has a definite position," "believes strongly that one side of a controversial issue is correct and should prevail," and is "in fact partial." It thus could well lead to the danger, remarked by the Commission, of the "covert propagandist." More broadly, by deterring the licensee from voicing its opinion in any and all circumstances, it must at times put the licensee in the position of being compelled to subordinate its view of the public

interest to its own private interest in protecting the license against attack. The issue of editorializing thus presents another example of the broad conflict of interest – between a media owner's obligation to the public and his private interest arising from affiliation with another media outlet in the same market – that inevitably attends local cross-media ownership and newspaper-broadcast affiliation in particular.

Nor is the conflict of interest or the harm to the public obviated if the newspaper-affiliated station takes the bolder and apparently less common course and does editorialize freely. On one hand, there is then the danger of "collusion," or at least lack of independence, in the editorial policies of the newspaper and the co-owned station. This is the danger that concerned the Commission in the *WCCO* and *Chronicle* cases when it specified the issue, quoted earlier, of whether "the editorial and commentary treatment of public affairs" by the stations had been "the same or substantially similar" to that of the newspapers (17 F.C.C. 2d at 292; 17 F.C.C. 2d at 247), and also this issue:

> Whether the editorials, news, public affairs, or other programing broadcast by WCCO and WCCO-TV [or KRON-TV and KRON-FM] has been subject in its creation, production or presentation to the review, judgment, control or other influence of other media (or persons associated with them) with which the stations are directly or indirectly affiliated, or of persons with business or ownership relationships to such media. [17 F.C.C. 2d at 292; 17 F.C.C. 2d at 247.]

Given the realities of intracorporate control, it is difficult to see how the Commission or the public could

ever be assured that the editorial policy of a newspaper-owned broadcast station – much less such stations generally – was not "subject in its creation, production or presentation to the review, judgment, control or other influence of . . ." the newspaper publisher or owner. Indeed, given what would seem to be the common understanding of the nature of an editorial – the opinion held by the owner of the media outlet, or at least subject to his control – it would seem inappropriate and quixotic, as well as impossible, to insist that the editorial policies of a newspaper and broadcast station under the same ownership in the same city be formulated in complete independence of each other. One may well be skeptical, and one may guess the Baltimore public would be, of the explanation for generally similar newspaper-broadcast editorial positions given to Litwin by someone at the Baltimore Sun: "Given the same set of facts it's not surprising that rational men reach the same conclusions." Litwin Study, at 7-4. Yet to the extent there is a lack of independence in the newspaper and broadcast editorial policies, the public is not getting the benefit of "diverse and antagonistic" voices as it would if the outlets were separately owned.

At the same time, when the stations editorialize they are likely to feel under pressure to take at least some stands opposed to those of the affiliated newspaper. The newspaper-broadcast owner can then point to these differences in Commission proceedings, as is the custom of the owners of the Washington Post and the WTOP stations (which are publicly called the "Post-Newsweek Stations"). See Comments of the Washington Post Company and Post-Stations, Capital Area, Inc., in Docket No. 18110, May 17, 1971; *Federation of Citizens Associations of D.C.*, 17 RR 2d 1113, 115-16 (1969).

But even if this approach were more typical, it would not answer the problem or remove the conflict of interest. The self-restraint or abstinence of a common owner with respect to the editorial positions voiced by its media on particular issues, or even on all issues – though there is no way for outsiders to know – is no substitute for truly "diverse and antagonistic" voices. See the quotation from Mill's *On Liberty* in *Red Lion Broadcasting Co. v. FCC*, 295 U.S. at 392 n. 18. Beyond that, the common owner will be quite mindful, as will the subordinates authorized to formulate the editorial policies for the affiliated stations, of the need to take some stands opposed to that of the newspaper. The owners of the "Post-Newsweek Stations", would obviously be embarrassed, and whoever sets the day-to-day editorial policy for the stations must know it, if the owners were unable to cite to the Commission substantial examples of differences between the stations and the newspaper. The editorial judgment of the subordinates will thus be based not solely on their view of the public-interest merits of the particular issue, but also on the extraneous consideration of having to differ on some important occasions with the newspaper – a consideration based, of course, on the licensee's private interest in protecting the license. So here again private interest arising from the newspaper-broadcast affiliation intervenes, albeit in a backhand way, to affect the station's performance of its public-interest obligations. In sum, while such affiliation may have any of several impacts on the station's policy with respect to editorializing, it inevitably has some impact, and the impact necessarily impairs the public's interest in having the newspaper and the station represent truly "diverse and antagonistic" voices.

It is true that the newspaper-affiliated station is thus placed in the position, under the ad hoc approach to cross-ownership, of being damned either way. If it does editorialize, it can be attacked for "collusion" or undue similarity with the editorial positions of the newspaper, or perhaps for contrived dissimilarity; if it does not editorialize, it can be attacked in a comparative proceeding for that. But as the Court of Appeals pointed out in the *WHDH* case, this dilemma simply "underlines the inherent difficulty confronting the affiliate of a newspaper . . . ." 20 RR 2d at 2076. What is an "inherent difficulty" for the licensee is, for the public, an inherent feature of local-newspaper ownership which, whatever course the station chooses on the editorializing issue, compromises the public interest in "diverse and antagonistic" voices. The Commission can protect that interest only by removing the ownership structure that necessarily impairs it. It is possible that this result will be achieved on a case-by-case basis through comparative renewal hearings, in view of the recent decision in *Citizens Communications Center v. FCC*, 22 RR 2d 2001 (D.C. Cir. 1971). The Commission may thus find itself compelled, as in the *WHDH* case, to "penalize" newspaper-affiliated renewal applicants for falling on one or the other horn of the editorializing dilemma. It would seem both more effective and more in conformity with the Commission's expressed view of the equities, however, to achieve the result through rule-making action which would carry "proper safeguards, including most importantly an appropriate period for divestment." *"Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 18 RR 2d 1901, 1907 (1970).

* * *

C. The Commission's Authority to "Order Divestiture."

Not much need be said about the contention of NAB and ANPA that the "forced divestiture" feature of the proposed rules would itself exceed the Commission's authority. See, *e.g.*, NAB Comments, at 70-78; ANPA Comments (Vol. 1), at 25-27; ANPA Legal Memoranda (Vol. III), Memorandum K. Reliance is placed on cases such as *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962), and *Pan American Airways v. United States*, 371 U.S. 296 (1963). See, *e.g.*, NAB Comments, at 74. As NAB concedes, those cases upheld the power of an administrative agency to "order divestiture." In fact, as NAB does not report, the Supreme Court stated in *Pan American:*

> Likewise, the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority, as we held only the other day in *Gilbertville Trucking Co. v. United States* [371 U.S. at 312 n. 17].

But the entire contention is beside the point. It is based on a different meaning of "ordering divestiture" from that involved here. The cases relied on concerned the authority of an administrative agency to order divestiture on the part of a company engaged in private business but subject to the agency's *continuing regulation.* There is a fundamental difference between that kind of administrative action and what is involved here. At issue here is the exercise of this Commission's authority to make rules specifying the standard of "public interest, convenience, and necessity" that it will apply, in the future, in granting and renewing broadcast licenses – licenses which by stat-

ute shall not be "for a longer term than three years" and shall not "be construed to create any right, beyond the terms, conditions, and period of the license." 47 U.S.C. §§307(d), 301. The question here does not concern, as NAB claims, the Commission's authority "to terminate licenses or require divestiture of licensed facilities . . . ." NAB Comments, at 77. Rather the proposed rules are properly characterized, in the terms used by the Commission to characterize its Chain Broadcasting Regulations (which also required "divestiture"), as "the expression of the general policy we will follow in exercising our licensing power." See *National Broadcasting Co. v. United States,* 319 U.S. 190, 196 (1943). What is at issue is whether the Commission, when it adopts a new rule applicable to its licensing process, is compelled to "grandfather" all existing arrangements inconsistent with that rule. If that is the case, then the Commission's power to make rules "as public convenience, interest, or necessity requires" (47 U.S.C. §303) is seriously and perpetually curtailed. There is nothing in the Act to suggest that the Commission is so hobbled. On the contrary, such a conclusion would be difficult to reconcile with the explicit provisions that broadcast licenses provide for "the use of such channels, but not the ownership thereof," that they are granted "for limited periods of time," and that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. §301.

Nor is the asserted conclusion supported by past practice. As the Commission points out in the Further Notice of Proposed Rule Making (par. 39, n. 9), it has dispensed with grandfathering in the past. In addition to the example there cited, it is noteworthy, as already mentioned, that the Chain Broadcasting Regulations led to the divestiture of a number of radio stations and an entire national network (see *National Broadcasting Co. v. United States,* 319 U.S. at 197, 208, 206-208) as well as to other fundamental changes in network practices – certainly a "restructuring of the industry." Further, the Commission has also dispensed with grandfathering in the rules it recently adopted with respect to TV-CATV combinations in the same market and network ownership of CATV systems anywhere. Second Report and Order in Docket No. 18397, pars. 15-16. This too might fairly be described as the restructuring of an industry, albeit a young one. (In any event, that ruling is a square precedent for the propriety of divestiture with respect to the proposed newspaper-cable rule in Docket No. 18891. See also *Pikes Peak Broadcasting Co. v. FCC,* 15 RR 2d 2063, 2074 (D.C. Cir. 1969).)

If there were any doubt as to the Commission's authority to "order divestiture" in connection with the rules proposed here, it would be removed by recent decisions of the Court of Appeals. In *Joseph v. FCC,* 404 F. 2d 207 (D.C. Cir. 1968), the court was dealing with the subject of media cross-ownership at the local level (though before the Commission's newspaper proposal had entered the picture). And it declared: ". . . of course an agency may change its standards prospectively, though that power is not in derogation of *the duty to change them retrospectively* when that better furthers the overall public interest." 404 F2d at 212 (emphasis added). True, the "retrospective" change to which the court referred would have come about in that case through a transfer hearing rather than a rule-making proceeding; but it scarcely seems likely that the Commission would be without authority to achieve the same "retrospective" result by rule-making, where it can do so without im-

posing forfeitures and with the other public-interest advantages that both it and the Court of Appeals have recently noted. See Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 18 RR 2d 1901, 1907-08 (1970); *Hale v. FCC*, 425 F.2d 556, 560 (D.C. Cir. 1970).

The *Hale* case is also dispositive here. The court there affirmed the Commission's denial of a license-renewal hearing on allegations of undue media concentration, including a newspaper-broadcast combination, in Salt Lake City. In doing so the court relied on a representation made by the Commission in denying a renewal hearing with respect to yet another newspaper-television combination, this one in Washington, D.C. *Federation of Citizens Association of* the District of Columbia, 17 RR 2d 1113 (1969). The Commission there said, and the court quoted:

> . . . any actions in this area as to a licensee such as this would be appropriate only in the context of overall rule-making proceedings. In this connection we point out the outstanding inquiry on conglomerate ownership and the specific rule-making proceeding, FCC Docket No. 18810. [425 F.2d at 560.]

In relying on these assurances by the Commission based on this very rule-making proceeding, the court could scarcely have contemplated that the Commission would be without authority to make rules affecting the existing media concentrations about which the court expressed its concern. This conclusion is buttressed by the concurring opinion of Judge Tamm, who spoke, for example, of "[t]he risk inherent in allowing these accretions of power to persist unchecked." *Id.* at 562. As the two opinions in the *Hale* case indicate, the Court of Appeals is relying – as is the public – on the Commission's repeated assurances that it will deal with the issue of media concentration through the vehicle of rule-making and in this proceeding. For example, there is the Commission's statement that "the overall structure of the industry, so far as multiple ownership and diversification are concerned, should be the subject of general rule making proceedings rather than ad hoc decisions in renewal hearings." Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 18 RR 2d 1901, 1907-08 (1970). Such assurances would ring hollow if, as NAB and ANPA contend, rules made in this proceeding could not have an impact on the renewal process and thus could not affect the existing structure of the industry. But the Commission is not so impotent. It has the power and the duty to reach the merits of the policy issues presented in these proceedings.

[Comments of Post-Newsweek Stations,
Capital Area, Inc. (May, 1974), pp. 6-17]

II. COMMON OWNERSHIP OF A NEWSPAPER AND TELEVISION STATION IN THE SAME MARKET DOES NOT PREVENT VIGOROUS COMPETITION IN THE SALE OF BROADCAST ADVERTISING WHICH SATISFIES THE PURPOSES OF THE ANTITRUST LAWS.

In fact, in most broadcast markets there is vigorous competition for broadcast advertising revenues irrespective of any common ownership of a newspaper and television station in the market. In those typical markets there is no possible reason for the Commission to give any weight to economic consequences of cross-ownership.

The typical television station meets competition for the sale of advertising from at least two network television stations and a number of independently owned radio stations. In major markets there are likely to be additional television stations and a multitude of radio stations. It is a rare broadcast market in which any one station has anything approaching a monopoly share of local advertising revenues, and certainly the typical station's share is far short of a monopoly of local, national or total broadcast advertising. In short, insofar as broadcast advertising is concerned, in most markets no antitrust question is presented even if cross-market competition from other media is not considered.

The intense competitiveness of typical broadcast advertising markets is no different where there is newspaper cross-ownership. No one has produced evidence that cross-ownership markets are any less competitive.

Nor is it apparent why they should be less competitive. A newspaper-affiliated station has at least the same incentives to compete for broadcast advertising revenues with the other stations in the market as it would if it were owned by a local bank or department store or any other local business establishment. And it is unlikely that competition in the *bradocast* advertising market will be threatened either by cross-market use of the newspaper's position *in its own market* or by reduced cross-market competition between the newspaper and the television station.

The Newspaper's Market Power.

There is no danger that newspaper affiliation will permit television stations to dominate their markets because of the financial resources of newspapers. The competing broadcast owners in most markets include national networks, national multiple broadcast owners, conglomerates, or other major commercial enterprises. A newspaper-affiliated television station is rarely, if ever, an economic giant among pygmies.

Nor is there any reasonable prospect that a newspaper owner will attempt to exploit its relationship with newspaper advertisers so as to give a commonly owned television station an unfair competitive advantage in the broadcast market. For one thing, the use of forced tie-in arrangements and other predatory commercial practices by which such exploitation might theoretically be accomplished is prohibited by the Sherman Act. Moreover, in the broadcast business, unlike other businesses, such practices would be subject to discovery and discipline by the Commission as well as by the Justice Department. If they were committed, they could lead to a wide array of FCC sanctions including loss of the offending owner's

license. In addition, apart from the gravity of these deterrents, where there is no record of such predatory practices under an existing cross-ownership, there can be no reasonable basis for assuming that they will occur if the cross-ownership continues.

In fact, WTOP-TV and The Washington Post—and we believe many other commonly owned television stations and newspapers as well—maintain wholly separate and autonomous advertising sales operations, with no joint sales rates or sales arrangements. The Commission could appropriately establish a requirement, applicable prospectively as a condition of renewal, that any television station affiliated with a newspaper will thereafter maintain wholly separate advertising sales operations with separate sales personnel and will not join with its affiliated newspaper in any joint selling or any other practices which the Commission may determine to be potentially anti-competitive.

Reduction of Competition Between Newspaper and Television Station.

The Antitrust Division's evident assumption that there is less competition *between* a commonly owned newspaper and a television station than there would be under separate ownership is not substantiated by any evidence of actual practice. In fact, common ownership does not prevent intense competition between the affiliated newspaper and television station. Indeed, in some cases that competition is if anything more aggressive than the competition between the newspaper and separately owned broadcast stations in the same market.

Furthermore, the potential scope for any reduced cross-market competition is quite small, because the portion of available advertising revenues for which newspapers and television stations are close substitutes is quite small. First, for the great bulk of local newspaper advertisers, television is not a realistic alternative. Television is too costly for the small advertiser, too limited for the advertiser who wishes to convey information about numerous items or detailed information about particular items, and too transitory for advertising messages which require reflection. Conversely, newspapers cannot readily serve advertisers whose message depends heavily on visual or oral impact, true-to-life depiction, mood, or timing. Second, those advertisers which do use both media frequently use them as complements rather than as alternatives. Third, there is little direct price competition within particular markets between newspapers and television stations because of the basic incomparability between the time sold by the local television station and the space sold by the local newspaper. For such reasons, the courts which have made findings concerning cross-market elasticities between newspaper and television advertising have concluded that newspaper advertising is a distinct market with relatively little overlap between it and broadcasting. *United States* v. *Citizen Publishing Co.*, 280 F. Supp. 978 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969); *United States* v. *Times Mirror Co.*, 274 F. Supp. 606 (C. D. Cal. 1967); *Bowen* v. *N.Y. News Inc.*, 1973 CCH Trade Cases ¶ 74, 590 (S.D.N.Y. 1973).

The Antitrust Division's Hypothetical Market

In lieu of any showing that broadcast advertising markets are not highly competitive regardless of newspaper

cross-ownership, recent petitions to deny applications for renewal of newspaper-affiliated licensees filed by the Antitrust Division have based their showing of market concentration on a hypothetical market combining local newspaper and broadcast advertising revenues. This approach has the rhetorical advantage of yielding in some instances impressive-looking numbers reflecting the commonly owned newspaper and television stations' share of this artificial market. It should be apparent, however, that the magic of market definition does not change any of the underlying realities.

A hypothetical local newspaper-broadcast advertising market looks heavily concentrated for the simple reason that the local newspaper advertising market, which is necessarily heavily concentrated, accounts for the overwhelming bulk of local newspaper and broadcast advertising revenues.* By combining the large concentrated newspaper market with the small competitive broadcast market, the Antitrust Division attains the appearance of concentration in a newspaper-broadcast market. The fallacy of this approach can be illustrated by the example of a one-newspaper, multi-broadcaster city in which there is no cross-ownership and in which the television and radio stations compete on an equal footing. In such a market, on the Antitrust Division's analysis, the newspaper alone would have something approaching a prima facie monopoly share of the hypothetical local newspaper-broadcast market; but in the real world it is obvious that such a newspaper's supposed "monopoly" gives it no power to control prices for broadcast advertising and has no effect

*A market so defined is also distorted by the failure to include advertising from any other non-broadcast media except newspapers—i.e., from billboards, posters, general circulation magazines, mass direct mailings, and the like.

at all on the competition between the several broadcast stations for such revenues. The same is true where one of the television stations is commonly owned with a newspaper: redefining the market to include the newspaper yields a slightly greater appearance of heavy concentration, but it does not change the fact that there is vigorous competition for broadcast advertising revenues.

The illusion of heavy concentration in broadcast advertising markets fostered by the Antitrust Division essentially results from the composition of newspaper markets, not from any concentration in broadcasting markets or any effects of newspaper-television cross-ownership. The figures developed to show concentration in an artificially drawn market for the sale of local newspaper-broadcast advertising reflect little more than the trend toward one-newspaper or two-newspaper markets as a result of economic conditions in the daily newspaper publishing industry. This is a question to which Congress has already addressed itself in the Newspaper Preservation Act, 15 U.S.C. §§ 1801-04, by providing antitrust exemptions for joint operating agreements among some daily newspapers. As fundamentally a newspaper question, it is not well suited for regulatory solution by the FCC, whose responsibilities center on the public interest in the full and effective use of broadcasting.

III. A LICENSEE'S AFFILIATION WITH A NEWSPAPER IN THE SAME MARKET IS CONSISTENT WITH THE COMMISSION'S DIVERSITY POLICY.

The Commission rightly regards diversity in the sources of news and opinion as an important objective to be served by its licensing policies. We believe that common ownership of a newspaper and a television station in the same market can be fully consistent with this objective,

especially if they maintain entirely separate news and editorial operations. Moreover, in the many markets where there is already a substantial diversity of media voices, still greater diversity is not so transcendent a public interest objective as to require a prophylactic rule against newspaper-television cross-ownership regardless of countervailing public interest considerations.

Diversity of news and opinion sources is important to the public interest under the Communications Act above all because it contributes to an informed electorate. A variety of sources of information and perspectives on public issues makes it more likely that the truth will be discovered and widely understood. Cross-ownership may make that objective less likely to be achieved than under separate ownership (depending on the identity of the separate owner), if the news and editorial operations of the commonly owned stations are intermingled, and if the station does not itself present news and opinion taken from a variety of sources. But separate ownership is much less central than other attributes of prospective licensees in promoting diversity, and in some circumstances it may indeed be counter-productive.

Separate ownership is no guarantee of diversity. As one commentator has noted, "a flick of the radio dial should be sufficient to dispel [the] illusion" that an abundance of separate sources means an abundant variety of information and opinion. Barron, "An Emerging Right Of Access To The Media?" 37 *Geo. Wash. L. Rev.* 487, 498 (1969). Stations which regard news and public affairs programming as no more than routine obligations to be met so as to satisfy the Commission, or as adjuncts to entertainment programming, are likely to sound monotonously similar in their informational programming. They may rely heavily on the networks, the wire

services, and superficial reporting of the news they carry. They may carry relatively few expressions of opinion likely to contribute to public debate or to provoke public response over their facilities. Moreover, the fact that some separate station owners have strong views on public issues does not necessarily mean that they have different views. If two station owners belong to the same local business or financial community, the similarities in their views may be more important than the differences.

As these observations suggest, a station's contribution to the diversity of information and ideas depends principally on the importance it attaches to its information and editorial functions and on the independence of the station's personnel to pursue facts and opinion wherever they may lead. A station that carries a large amount of information, news and public affairs programs contributes more diverse information as well as more total information to the public dialogue than a station which carries limited amounts of such programming in a perfunctory way. A station which presents a large number of editorials and editorial replies as well as a variety of commentators by itself contributes more to the diversity of available opinion than a station which offers little opinion programming. A station which gives its reporters free rein, subject to requirements of responsible reporting, will produce more diverse and informative reporting than a station closely tied to local establishment interests.

These attributes of stations likely to contribute most to diversify are not only more important than separate ownership; they are also more likely to be found in stations owned by newspaper companies than in those owned by many of the prospective alternative separate owners for cross-owned television stations.

Finally, whatever weight might be given to maximizing the total number of separately owned media voices in the consideration of original license applications, such a policy can not be controlling where an incumbent licensee seeks renewal on the strength of an overall record of meritorious service to the public interest. The Commission's consistent policy has been to give controlling weight to such a record in considering renewal applications, and to take into account a host of other comparative considerations in proceedings involving original applications. There is no reason to change that policy now as to stations that are cross-owned. Certainly, there is no reason to change it in major markets where there is already an abundant diversity of media voices, or for cross-owned stations which maintain separate and autonomous news and editorial operations from those of the commonly owned newspaper.

In the typical urbanized area there is no want of whatever diversity separate ownership can provide. A large number of different media owners have access to audiences throughout such markets, over several television stations, literally dozens of radio stations, billboards, mass circulation magazines, and the like. In turn, the audiences have ready access to a nearly countless multitude of competing voices, including numerous special interest magazines, out-of-market newspaper, out-of-market television stations, suburban newspapers, cable television, professional and trade publications, direct mail communications, handbills, and leaflets. In such markets, if common ownership results in one or two fewer separately owned media voices than the theoretical maximum, the effect on the public interest is not substantial.

If existing cross-ownerships are nonetheless thought to present any threat to diversity, the appropriate solution is to require the station to maintain separate and independent news and editorial operations—as has long been the practice of WTOP-TV and The Washington Post. The efficacy of this solution has been implicitly recognized by Congress itself in the Newspaper Preservation Act, where it permitted newspapers in the same market to *eliminate* economic competition between them pursuant to joint operating arrangements on condition "that there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined." 15 U.S.C. § 1802(c). This solution was adopted for the express purpose of preserving separate and independent voices in the same market—the very objective sought by the Commission's diversity policy.

The solution adopted for non-competing newspapers should be more effective as applied to commonly owned newspapers and television stations. This is so not only because the cross-owned media are likely to continue to compete with each other, but also because of the panoply of regulatory safeguards of diversity applicable to broadcasters. Newspapers are not subject to any fairness doctrine, they are not bound by any personal attack rules, they are not supervised by any federal regulatory agency, and above all they do not face the prospect of submitting their overall performance to formal scrutiny every few years by a body empowered to take their license away. Broadcasters affiliated with newspapers, who are subject to all these restraints, and who in addition maintain independent news and editorial operations, are

not a threat to diversity. Where they have served the public interest well in the past, the public interest would not be served in the present by a requirement that they be divested.

FURTHER COMMENTS OF NATIONAL CITIZENS COMMITTEE FOR BROADCASTING [May 15, 1974]

National Citizens Committee for Broadcasting (NCCB) hereby files its further comments in the above-captioned proceeding, as a prelude to its appearance at oral argument in this docket.

I. INTEREST OF NCCB.

NCCB is a non-profit membership organization devoted to increasing public awareness of and participation in the regulation of broadcasting and allied communications fields. The Commission is familiar with NCCB's longstanding opposition to concentration of control in the media through its participation in several Commission proceedings on this subject. It has, for example, participated in earlier stages of this proceeding,[1] and has opposed wholesale waiver of the television-cable cross-ownership rules.[2] In fact, in its comments in response to the Commission's 1968 *Notice of Proposed Rule Making* in this docket (33 F.R. 5315), NCCB was one of the first parties, along with the Justice Department, to suggest that the Commission include newspapers in its consideration of cross-ownership and concentration of control of the media.

II. BACKGROUND OF THIS PROCEEDING:

In 1970 the Commission adopted part of the relief NCCB was seeking. It adopted the so-called "one to a

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[1] See *Further Notice of Proposed Rule Making*, Docket 18110, 22 F.C.C. 2d 339, ¶23 (1970).

[2] "Comments of National Citizens Committee for Broadcasting," Docket 18891, filed in response to *Memorandum Opinion and Order* of March 13, 1974.

market" rules prohibiting common ownership of a television station and an AM/FM combination in the same market.[2a] In its *Further Notice, supra,* issued at the same time, the Commission proposed amendment of its rules to proscribe common ownership of a daily newspaper and a TV, AM or FM broadcast station in the same market. This proposal also suggested breaking up common ownership of AM-FM combinations in the same market unless a showing could be made that the stations were technically or economically so interdependent that they could not possibly be operated under separate ownership. The Commission contemplated divestiture, within five years, of commonly owned newspaper-broadcast concerns and AM-FM operations to bring the ownership structure of the broadcasting industry into compliance with the proposed amendments to the rules.

NCCB supports the Commission's proposal to require independent ownership of AM-FM stations. We believe that continuation of AM-FM combinations significantly reduces the diversity of local sources of information—particularly in smaller cities and towns with no television assignments. NCCB believes that adequate evidence already exists to require independent ownership.[3]

We shall, however, direct our attention in these comments primarily to the issue of newspaper-broadcast cross-ownership, which we believe is the most immedi-

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[2a]The original rules would have barred common ownership of an AM and FM station in the same community. This rule was amended in 1971 to allow such combinations, subject to the 50% non-duplication of programming rule.

[3]See, e.g., "Comments of Students' F.C.C. Study Group", filed May 17, 1971, in this proceeding, and "Special Report: The Rites of Passage Are All Over for FM Radio: It's Out On Its Own," *Broadcasting,* Sept. 24, 1973, p. 31.

ately critical aspect of the *Further Notice.* As the Commission itself pointed out in Paragraph 26:

> It has now become clear that the most significant aspect of the problem [of concentration of control] is the common control of television stations and newspapers of general circulation. For, the studies presented in this record and otherwise available are in full agreement that the public looks primarily to these two sources for its news and information on public affairs. Other broadcast services and other printed publications are substantially less significant in this respect.

In footnote to the above, the Commission noted:

> . . . [C]ontrol of the sources of information and views on public issues is significant even though there may be an absence of any definitive measurement of the degree to which mass communications actually influence thought and behavior.

The Commission went on to provide brief documentation of the extent to which the public relied on newspapers and television for its news and opinions. The evidence supports what common sense would dictate: that joint ownership of newspapers and television stations poses serious problems to a society which believes that the "centralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable."[4]

In dealing with the problem of cross-owned newspaper and broadcast interests, it is imperative, for the sake of all concerned parties, that the Commission

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[4]*First Report and Order,* Docket 18110, 22 F.C.C. 2d 306, 310 (1970).

adopt rules specifying a ban on at least certain levels of concentration, and a prima facie threshold assumption of its undue concentration as to others.

The House of Representatives has recently passed legislation which affects procedures and standards for broadcast license renewals.[5] One of the provisions of the bill would require that the Commission not consider cross-ownership in renewal proceedings unless it has first promulgated rules defining its approach to cross-ownership questions. It further requires that the Commission adopt any such rules within six months of the enactment of the legislation. The House Commerce Committee opposes Commission regulation of cross-ownership in what it calls a "haphazard, subjective, and oft-times inconsistent manner"[6] on a case-by-case basis. It also feels that this proceeding should not be delayed any longer.

NCCB does not agree with the House bill to the extent that it might be read to ban considerations on a case-by-case basis of media concentration of control in situations where the Commission has not adopted prophylactic rules totally prohibiting cross or multiple ownership of certain types of facilities. In such a case, individualized examination of cross-ownership situations not totally barred would still be necessary.

NCCB does, however, agree with the House that four years is far too long for this proceeding to have been pending without adoption of rules. Much litigation time and effort has been expended by citizens groups, as well

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[5]H.R. 12993, The Broadcast License Renewal Act, passed in the House May 1, 1974.

[6]House Report No. 93-961, 93d Cong., 2nd Sess. at 19 (1974).

as by broadcasters, on concentration of control issues in cases where divestiture might have been mandated in a rule adopted soon after all comments and replies were originally received by the Commission to the *Further Notice* in August, 1971. The Commission has ample studies and comments before it setting forth the actual and potential adverse effects of cross-ownership and the lack of countervailing benefits from such media concentration of control. The Commission should, therefore, act immediately to adopt rules barring local newspaper-broadcast combinations, either through a flat ban or by setting forth categories of concentrated structures that will be treated either as (a) *per se* having anticompetitive economic efforts and reducing the diversity of local informational sources or (b) raising a presumption of such effects, requiring a hearing to that would take into account certain specified factors.

III. NCCB's PROPOSED RULE:

NCCB would argue that a flat local newspaper-television cross-ownership ban would be justified, not only for the strong First Amendment and economic policy reasons set forth below, but also for reasons of administrative clarity. Nevertheless, recognizing that the Commission may wish to adopt an alternative approach, we urge the Commission to adopt a rule which sets forth both *per se* and *prima facie* levels of local concentration. Such a rule, we believe, is mandated by (1) the evidence before the Commission, (2) the First Amendment, and (3) the Commission's duties under the public interest standard of the Communications Act.

NCCB therefore urges the Commission to adopt a rule modeled on that set forth in the Appendix to these comments, which would:

(a) Impose a flat ban on newspaper-television cross-ownership combinations where a single media owner holds over 30% of the market of total informational sources on local events and issues, and

(b) Raise a presumption of undue concentration, requiring a hearing in which specifically codified factors would be considered, where a single owner holds between 20-30 percent of the market.

Below the 20% market share figure, only substantial factual allegations of actual abuse of concentration of control, which will be still open to F.C.C. consideration under any conceivable proposal in this docket, would be grounds for a hearing at renewal.

This two-part approach is called for if the Commission adopts anything less than an across the board prohibition. Without a flat ban, the Commission must still leave room for consideration of individual market factors. The critical difference from past practice would be that such factors would be clearly spelled out in the Commission's rules. This would solve the basic problem that concerned the House Committee on Interstate and Foreign Commerce and the broadcasters who appeared before it. It would eliminate the potential for "haphazard" case-by-case adjudication by the Commission in this area, and provide clearer standards for review of Commission cross-ownership decision. Such an approach would be consistent with the public's interest in enforcement of the fundamental national policies favoring economic competition and diversity of sources of information, yet would provide the clearer standards to guide their conduct that media owners have been requesting.

For those over 30% of market cases to which the flat ban applies, divestiture within five years should, as outlined in the *Further Notice*, be required. Similarly, divestiture ordered after a hearing on the 20-30% presumption also should be allowed over a five-year period.

New acquisitions of joint newspaper-broadcast holdings should be totally barred by the rules, no matter what the market shares involved. The only rationale for anything less than a flat ban would have to be Commission acceptance of the argument that some past media owners legitimately assumed that acquiring media combinations that attained a concentration level less than that raising a *prima facie* case under our proposed rule was such a minimal restraint on speech and competition in the market place that it would not create a risk of divestiture at some future date. While questionable, such a rationale, even if adopted for the past, could in no way bear on prospective acquisitions.

Such an approach would be consistent with the Justice Department's more restrictive approach to new acquisitions of competitors than to requiring divestiture of existing combinations. The Department's antitrust "market share" guidelines for defining what horizontal mergers would normally be attacked set forth very low threshhold levels of assumed anticompetitive concentration.

For example, in highly concentrated markets, defined as those where the four largest firms have approximately 75% of the market, the Department indicated that it would ordinarily challenge mergers between firms with the following market shares:[7]

[7] All of the figures used herein are taken from Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 Northwestern U.L. Rev. 159, 171 (1971).

Acquiring firm	Acquired firm
4%	4% or more
10%	2% or more
15% or more	1% or more

Even when the top four firms control less than about 75% of the market, the guidelines call into question mergers between competitors with the following market shares:

Acquiring firm	Acquired firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25%	1% or more

These guidelines provide a convenient benchmark for evaluating specific levels of concentration.

The proposed market share guidelines suggested by NCCB herein for application to newspaper-broadcast cross-ownership are, of course, far less restrictive than those the Justice Department applies to other industries. They are, however, primarily designed to deal with an existing concentrated industry structure calling for divestiture. The low threshold limits for mergers in the Justice Department guidelines would argue for a flat ban, or at least lower *per se* and *prima facie* requirements, as to prospective cross-ownership situations created by acquisition or transfer.

IV. REASONS FOR ADOPTION OF NCCB'S PROPOSED RULE:

A. Cross-Ownership of Sources of Information on Local Issues and Events Represents the Chief Threat to Diverse Expression in Local Communities, and is the Concentration Situation Most Clearly Contrary to the Public Interst Standard.

It is important and feasible for the Commission to fashion its cross-ownership rules in terms of the need for *local* diversity of news sources. While concentration on a national scale poses serious problems,[8] the worst effects of cross-ownership are evident at the local level. Local issues should be reported from a variety of sources to promote the greatest potential for intelligent decision-making by the local electorate.

Local political campaigns, bond issues, highway plans, school administration, and the conduct and standards of local officeholders are just a few of the issues that are of immediate importance in the daily life of a community. To have the two most critical sources of information about these issues—a local television station and a local daily newspaper—commonly owned significantly reduces the chance of robust debate between competing local editorial viewpoints on these issues.

While competing viewpoints on national issues may be of equal significance, the local citizens of any community will be far more likely to receive such views through alternative sources such as national magazines, out of town newspapers such as the New York Times, Wall Street Journal, or National Observer, books, and out

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[8] See *infra*, for discussion of the need for enforcement of the Commission's Top 50 Markets Policy.

of town television and radio stations. While these sources may therefore be relevant in constructing a market for sources of information on national issues, they are not relevant here.[9]

Another disadvantage of mutually-owned newspapers and broadcast facilities in the same market is the potential created for suppression or distortion by one outlet of news adverse to the other medium's interests. Local media are normally themselves the subject of controversy, since their actions and decisions play an important role in shaping local events.[10] If the media are in competitive positions, they will be encouraged to serve as each other's watchdogs.

Competition thus increases the possibility that the media will cover stories about other media, which may be otherwise ignored. Information on newspaper or station strikes, hiring and firing of controversial television and radio personalities, broadcast license challenges, criticism of the media—such stories are important local news, and deserve coverage. But when the local newspapers and television stations are co-owned, there is a risk that such stories will be blacked out because of the conflicts of economic interests that exposure would entail.[11]

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[9] See *infra*, Section V-A.

[10] For example, 44% of those ascertained in one licensee community survey in Columbus, Ohio, found mass media to be the second most pressing problem in the community. See 1970 Application of *RadiOhio, Inc.*, for renewal of WBNS-AM-FM.

[11] For other examples of the dangers of cross-ownership particularly on the local level, see *Times-Herald Printing Co.*, 25 F.C.C. 2d 984, 999-1006 (Johnson, dissenting).

B. Both the First Amendment and the Communications Act Mandate Adoption of a Rule Such as NCCB Has Proposed.

The Commission has both the authority and the obligation to consider diversification of media control as a critical factor in broadcast proceedings. In its *Policy Statement on Comparative Hearings*, 1 F.C.C. 393, 394 (1965), the Commission explicitly stated that "[d]iversification is a factor of primary significance since . . . it constitutes a primary objective in the licensing scheme."

One of the most important regulatory means by which the F.C.C. promotes First Amendment and antitrust objectives is by providing for a diversity of sources of information and a competitive atmosphere in the marketplace of ideas. The need for a rule is thus particularly acute in matters affecting important First Amendment interests.

Indeed, the United States Constitution and the Communications Act of 1934 mandate adoption of a rule such as that proposed in the Appendix as the least restrictive means of furthering the public's First Amendment rights. The public interest, convenience and necessity encompass the basic objectives of the First Amendment; and the public's right to know and "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" are the paramount First Amendment interests. *Red Lion Broadcasting Corp.* v. *F.C.C.*, 395 U.S. 367, 390 (1969). See also *NBC* v. *United States*, 319 U.S. 190, (1943); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

On the other hand, since broadcasting stations are inherently not available to all, due to scarcity in the publicly-owned radio spectrum, the allocation of stations

has properly been limited and placed under a licensing scheme. See, *e.g., NBC* v. *United States, supra.* Thus, under Congressionally delegated standards for regulation, which necessarily encompass First Amendment objectives as part of the public interest, the Commission is obligated to foster diversity of information sources and outlets to the fullest extent possible, *e.g., Associated Press* v. *United States*, supra; and it must do so in its licensing function by means which are least restrictive of First Amendment rights. *E.G., United States* v. *Robel,* 389 U.S. 258, 268, n. 20 (1967).

In regulating broadcasting to foster diversity of information sources, the Commission could not, for example, license all of the broadcast media in a particular locality to the same entity. This obviously would restrict the public's First Amendment right to receive access to a diversity of information sources. Today, given the demand for broadcast facilities, it would be similarly contrary to the First Amendment for the Commission to unduly restrict access to diversity of viewpoints, or access to the mass media generally, by allowing undue concentrations of control of the local mass media. Since rules relating to ownership are less restrictive than rules and regulations relating directly to program content, they are to be preferred as the least restrictive means to achieve true diversity of information sources in a locality. *Cf. CBS* v. *Democratic National Committee,* 412 U.S. 84 (1973).

Under this analysis, the Commission is obligated to adopt rules which, on the evidence adduced in the present extensive rulemaking proceeding, must foster diversity by the least restrictive means: a ban against significant cross-ownership of local mass media.

C. The Commission's Past Experience Shows That a Strict Rule Must Be Adopted, Rather Than a Policy Statement.

The Commission's past experience in regulation of multiple ownership clearly illustrates the compelling reasons for the Commission to proceed by rule, as opposed to action by policy, in removing or reducing concentrated ownership patterns in the mass communications media. Three examples of Commission experience with both types of regulation show clearly that the adoption of a strict rule limiting newspaper-television cross ownership is the only means by which concentration will be adequately curbed.

1. Duopoly Rules

In its 1964 amendment to the multiple ownership rules the Commission decided to issue specific rules defining "market", rather than to continue with a policy of ad hoc adjudication of the duopoly rules. In its *Report and Order,* 2 RR 2d 1588 (1964), the Commission made a commitment to diverse ownership that it should reaffirm in this docket.

> the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have 'an inordinate effect, in a political, editorial or similar programming sense, on public opinion at the regional level.' [12]

It went on to discuss the relative merits of adopting a rule versus continuing its past policies in attaining the goal of diversified ownership.

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[12] *Id.* at 1592.

Three considerations were paramount in the Commission's decision to adopt formal rules. The first consideration was consistency:

> A review of all cases decided under the present duopoly rules has convinced us that the pattern of grants which has developed through piecemeal litigation does not represent a desirable realization of our national multiple ownership policy. We feel, therefore, that *the most effective way to implement our policy against duopoly is to emphasize the overriding decisional significance of the problem through adoption of a fixed standard.*[13]

The second consideration was the strain on the Commission's resources by having to define the market difficulty in each case:

> We do not believe it to be in the public interest for the Commission to dissipate its limited resources in a manner not required by statute and not defensible in terms of the results achieved.[14]

The third consideration was fairness:

> A specific overlap rule defines the Commission's position with respect to duopoly problems as they may occur in all ordinary applications. To this extent, potential applicants are able to plan their proposals with a greater degree of foreknowledge and the Commission's staff is better guided in performing its function.[15]

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[13] *Id.* at 1594. [Emphasis added.]

[14] *Id.* at 1595.

[15] *Ibid.*

Although the Commission's 1964 reasoning was directed to ownership of broadcast facilities alone, its rationale then for adopting a strict rule barring concentration rather than proceeding through a policy statement that would be applied entirely on a case-by-case basis is also applicable to a ban on cross-ownership of broadcast newspaper interests.

2. Multiple Ownership Rules

a. Rule Limiting Total Number of Stations Owned by a Single Licensee

Not only has the Commission outlined in theory the benefits of rules that set firm outer limits on ownership patterns, but its record of enforcement emphasizes the point even further. In its 1953 Amendment of the Multiple Ownership Rules (9 RR 1563), the Commission by rule limited to five the number of VHF television stations that could be owned by one party. This rule has been enforced consistently, across-the-board by the Commission, and no multiple owner currently holds licenses for more than five VHF television stations.

b. Top 50 Markets Policy

In contrast, the Commission's Top 50 Markets "Policy" has been observed in the breach. Promulgated in the 1968 Report and Order on Television Multiple Ownership Rules (12 RR 2d 1501), the Top 50 Markets Policy requires "a compelling public interest showing by those seeking to acquire more than three stations (or more than two VHF stations) in [the top 50] markets."[16] The adoption of this policy brought an end to an "interim policy", upon which the Commission had previously re-

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[16] *Id.* at 1507.

lied, which required that a hearing be held on any application for a station in the top 50 markets if a grant of the application would result, in one owner having more than one station in those markets.

In his opinion dissenting from the adoption of the Top 50 Markets Policy, Nicholas Johnson foretold the impotence of the future policy by describing the ineffectiveness of the past "Interim Policy":

> This is the same 'compelling public interest showing' that a Commission majority has so far found to justify waiving the hearing requirement in every case brought to the Commission under the previous interim policy. Thus a majority found that a compelling public interest showing for doing violence to the rule was made when WGN of Colorado, Inc., acquired a VHF in Denver, Colorado; WKY Television Systems acquired a UHF in Milwaukee, Wisconsin; Storer acquired a UHF in Boston, Massachusetts; Kaiser acquired a UHF in the Boston, Massachusetts, market; Capital Cities sold a VHF station in Providence, Rhode Island, and acquired a VHF in Houston, Texas; Kaiser acquired a UHF in Cleveland, Ohio; Baldwin-Montrose Chemical Company acquired VHF's in Minneapolis, Minnesota, Los Angeles, California, and Portland, Oregon; the Newhouse communications group acquired a minority interest in a UHF in Denver, Colorado; American Viscose acquired six UHF's in top-fifty markets; and ITT was to have acquired VHF's in New York, Chicago, Los Angeles, Detroit, and San Francisco. In each case the interim policy required a 'compelling public interest showing'. Past experience indicates that this 'requirement' is demonstrably meaningless. The Commission's policy with regard to multiple ownership will be what is now in its rules, and no ad hoc determinations will tighten those standards.[17]

Just over a month after adopting the Top 50 Markets Policy, the Commission proved Commissioner Johnson's predictions correct. Metromedia, already holding licenses for four VHF stations in the top 50 markets, was permitted to acquire a UHF in San Francisco, bringing their holdings to almost twice that allowed by the policy.[18]

In the next two years the Commission approved Taft Broadcasting's purchase of its seventh television station in the top 50 markets;[19] Capital Cities' package purchase from Triangle Publications which resulted in its "trade up" in the top 50 markets;[20] and Albany Television, Inc.'s request to buy its third top 50 market station.[21]

Next, the Commission sanctioned Dun and Bradstreet's purchase of all three of Corinthian Broadcasting's top 50 markets stations.[22] And, although the Commission found "compelling" public interest reasons for allowing McGraw-Hill to violate the policy in its proposed purchase of Time-Life's broadcast stations, McGraw-Hill was not willing to put those reasons to test in court. It chose instead to divest the excess stations rather than

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[17] *Id.* at 1510.

[18] *S. H. Patterson*, 12 F.C.C. 2d 50 (1968). One of the justifications for the Commission's approval was Metromedia's extensive resources assisting the growth of UHF television. However, within two years Metromedia abandoned the station as unprofitable.

[19] *WIBF Broadcasting Co.*, 17 F.C.C. 2d 876 (1969).

[20] *Triangle Publications, Inc.*, 28 F.C.C. 2d 80 (1971).

[21] *Ibid.*

[22] *Corinthian Broadcasting Corp.*, 28 F.C.C. 2d 736 (1971).

risk court reversal of the Commission's approval.[23] The Commission next approved Metromedia's purchase of its *fifth* VHF station in the top 50 markets.[24] Then, stretching the credibility of its "policy" to the extreme, the Commission found it in the public interest to waive the Top 50 Markets Policy once again for Metromedia, this time granting permission for it to buy its *sixth* top 50 market station.[25]

Perhaps the Commission's attitude toward its Top 50 Markets Policy is best expressed in its recent decision granting permission to WKY Television to buy its fifth top 50 markets station.[26] To justify this violation of the policy, the Commission listed six previous cases involving waivers (all described above). In doing this, it apparently hoped that by reminding the public of how poorly the policy had been administered in the past, it would agree that this further violation was reasonable.[27]

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[23] *Time-Life Broadcasting, Inc.*, 33 F.C.C. 2d 1099 (1972).

[24] *Cris-Craft Industries, Inc.*, 24 RR 2d 729 (1972). The Commission's reasoning was: Metromedia had held four VHF licenses and one UHF license, all in the top 50 markets; but since Metromedia had abandoned the UHF when it proved unprofitable, the Commission found no reason not to let Metromedia replace the top 50 UHF with a top 50 VHF, particularly since the VHF was in a slightly smaller market than the UHF had been.

[25] *U.S. Communications of Ohio, Inc.*, 36 F.C.C. 2d 653 (1972). This grant was given in spite of the fact that Metromedia was buying another UHF, having dumped its first UHF station after deciding that its profits were not great enough, and in spite of the fact that it told the Commission it would make no promises of improved services until it could determine the station's profitability.

[26] *Tribune Publishing Co.*, 29 RR 2d 517 (1974).

[27] The Commission's description of previous waivers symbolizes its lack of real commitment to the policy. For example, the

[footnote continued]

It is clear from these examples that if the Commission is committed to furthering diverse ownership of newspapers and broadcast facilities in a manner that will provide for principled future decisions, it must do so through a rule specifying a *per se* limitation on concentration, and specifying fixed guides for factors to be considered in concentration showings below this fundamental limit.

V. THE KEY DEFINITIONS OF THE PROPOSED RULE

The two critical questions that must be answered to adopt any rational cross-ownership rule are: (a) What is the relevant "market" in which the two media compete; and (b) How is any particular newspaper or station's share of that market computed.

A. Definition of the Appropriate Market

In measuring concentration of media control in a given area, "market" must be defined in terms of both (1) geographic area and (2) viable competition for local news and advertising revenues. In the past, the Commission has chosen two different geographic standards for judging the extent of concentration of media control in a given area.

In *Frontier Broadcasting Co.*, 21 F.C.C. 2d 570 (1970), the Commission designated Frontier's renewal application for hearing on whether it had amassed an undue concentration of control of the mass communications media—including newspapers—in the Cheyenne, Wyoming, market. The Commission rejected Frontier's arguments that the television station's total Grade B contour was the relevant

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reasons provided for granting the waivers include such unhelpful rationales as "no concentration of control" involved, and "allowance of as many as six stations in the top 50 markets".

area for consideration of this issue. Instead, the Commission supported the position of the Justice Department and viewed the relevant area as solely that in and around the city of Cheyenne.

In *Chronicle Broadcasting Co.*, 40 F.C.C. 2d 775 (1973), *appeal pending sub nom. Kihn* v. *F.C.C.*, D.C. Cir. Case No. 73-1627, however, the Commission reversed its judgment in *Frontier.* It considered Chronicle Broadcasting Co.'s media holdings in terms of all the media available in KRON-TV's entire Grade B contour. Although KRON-TV is licensed to San Francisco, its Grade B contour stretches as far as Sacramento and Stockton to the east and Salinas and Monterey to the south. KRON-TV's Grade B contour, in other words, encompasses television markets other than the one to which it is licensed to serve.

NCCB submits that the *Frontier* standard was a far more reasonable definition of geographical area for judging concentration of control. It is meaningless to try to promote a wide diversity of news sources in local markets, and then to define "market" so broadly that it becomes regional rather than local.[28]

As for a definition of "market" in terms of competing interests for *local* news stories and advertising dollars, NCCB suggests that it is only meaningful to speak in terms of the media in a market that are actually dependent on the market for either content or financial support. Thus, in assessing the number of competing

[28]The Commission's reliance on KRON-TV's Grade B contour for determining the extent of its concentration of control has been appealed, along with other issues in the case, to the Court of Appeals for the D.C. Circuit. *Kihn* v. *F.C.C., supra.*

media interests in a market, national publications and out-of-town newspapers and broadcast stations should not be counted. Professor Stephen R. Barnett has provided prior extensive comments to this effect in this docket, and NCCB supports his observations.

B. Market Share Definition

Once the Commission has arrived at a definition of market which rests on a basis of local, competing media, it can determine which markets require divestiture of co-owned newspapers and broadcast stations. This can be done most fairly through procedures patterned on those suggested by Terrall M. de Jonckheere, in his comments, "Monopoly in the Media", submitted in this docket.

Under this analysis the three major sources of *local* news in a given market—newspapers, television stations and radio stations—would be given reasonable and proportionate weights on a scale of 100, based upon their relative importance as local informational sources. For example, all newspapers would be given a combined weight of 40, all television stations would be given a combined weight of 40, and all radio stations would be combined with a weight of 20. Such figures would provide a rough but [substantially] meaningful index for measuring concentration.

With figures arrived at from this or a similar approach, the concentration in each type of news medium within the market can then be analyzed as follows:

(1) *Newspapers:* Each daily newspaper is accorded its share of the circulation in the market. Thus, if only one daily newspaper exists, it is weighted at 40; if there are two with equal circulation, each is weighted at 20. De Jonckheere would not take weeklies into account. We believe that they should be weighted at one-seventh their respective circulations, if at all.

(2) *Television:* Each station is given its proportionate share of the audience in the market. This might best be computed for each station by averaging its share of the evening and 11 P.M. local newscast audiences, based on a total of 40, since the rule's premise is diversity in *local* information dissemination. Thus, if there are three stations, each of which reaches an equal share of the evening and 11 P.M. local news audiences, each would be weighted at one-third of 40 or 13.3.

(3) *Radio:* Each station could be weighed one of two ways. For simplicity, all the radio stations in the market could be given equal weight. Thus, if there were twenty stations, each would be weighted at one. Or, to follow the more refined analysis above, each station could be given its share of the total of 20 based on its ARB share of the market.

When these computations are completed, they provide a rough index of the domination of local news sources by each newspaper or broadcaster. NCCB submits that, based on these figures, owners of media totalling more than 30 points in the same market should be required to divest themselves of one or more outlets until their total share is under the maximum standard of 30% of the market, or they have only one medium remaining in the market.

Such a standard, at least as an initial step, would normally allow the same owner to continue to hold a newspaper and radio station or a television and radio station in the same market, provided there was more than one newspaper or television station in the market. In several cases it would allow continuation of broadcast-newspaper ties. Most locally co-owned newspapers and television stations would be split up, however, particularly in smaller cities, but also in many larger urban areas.

VI. PROCEDURAL ELEMENTS OF THE PROPOSED RULE

A. Provision for *Prima Facie* Test as well as *Per Se* Test

The above definitional criteria will assist the Commission in promoting a wide diversity of ownership on an equitable basis. They provide consistent and fair standards for deciding whether or not to order divestiture *per se*, and will give the Commission the tools to meet the due process requirements called for in requiring divestiture by rule without an individual hearing.

Although the 30 percent rule described above would provide clear relief to communities suffering from egregious concentration of media control, relief must not be blocked off from the public in communities in which the ownership structure does not violate the specific ban, but is concentrated nevertheless. Thus, along with any rule that the Commission adopts setting a firm top limit on local cross-ownership, it should also by rule provide guidelines for cases involving concentration less than that prohibited *per se*.

Situations may arise, for example, where one party controls extensive non-media interests in a market, or media interests just outside that market. Even though its holdings may be technically within the Commission's outside limits, that party exercises an undue economic control of the market. The public interest requires a rule defining criteria for a Commission investigation and possible divestiture in such cases. Concurrent adoption of a rule providing a lower percentage for a presumption of concentration would be particularly critical if the Commission were to adopt a divestiture rule less strict than the 30% rule suggested here, since a large number of

markets suffering serious concentration of control problems would be exempted from automatic divestiture.

Appropriate guidelines for such undue concentration situations below the *per se* rule might well be developed as part of the Commission's *Inquiry into the Ownership of Broadcast Stations by Persons or Entities with Other Business Interests*, Docket No. 18449, 16 F.C.C. 2d 436 (1969) (the "Conglomerate Inquiry"). However, considering the fact that the Commission appears to have forgotten that inquiry, NCCB fears that deferring to that inquiry for definition of concentration guidelines will mean virtual abandonment of the attempt to define such guidelines.[29]

B. Effects of Ban on Acquisitions

The Commission's proposal, as outlined in the 1970 *Further Notice*, addresses not only divestiture of already-existing newspaper-broadcast combinations, but also acquisition of one medium by another in the same market. It suggests that

> if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned there within one year or by the time of its next renewal date, whichever is longer. No grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market.[30]

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[29] After five years, the Commission has yet to issue either a Notice of Proposed Rule Making or a termination order in Docket 18449.

[30] *Further Notice, supra*, at 346.

The media will argue that such a ban on future cross-acquisition will bring about decreased competition and diversity of news sources. Cases will be described in which floundering newspapers or stations will allegedly go out of business if they cannot be bought and nursed back to life by their competitor. To meet the test of the rules, we assume that to obtain a waiver on the grounds of an increase in diversity and competition the transferor would have to prove that no other buyer could be found after a long and diligent search. But even if this were true, providing relief in such cases would distort the proper government role in regulating the broadcasting industry. The F.C.C. was intended to promulgate rules and make decisions which promote free competition, not to prop up enterprises that prove unsuccessful. The Commission can take special circumstances into account, as to new communications forms, to help them get established, such as UHF and cable television. But to extend such reasoning to mean that old and well-established communications industries deserve the government's helping hand in anti-competitive practices confuses the basis of our free enterprise system.

Finally, it is not necessarily true that keeping one medium alive by allowing it to be co-owned by another medium does actually increase diversity. It is probable that a great number of other, smaller suburban and "underground" newspapers would develop in the void left by the failure of a daily newspaper. This has in fact happened in many cities, such as San Francisco, where a strike against the two daily papers in the 1960's led readers to choose between a plethora of Bay Area tabloid voices that vastly expanded their circulation to meet the information need.

C. Requirement of Consideration of Minority and Local Ownership Factors in Divestiture

Because of the current exclusion of minorities from ownership of the critical broadcast media in this country,[31] NCCB believes that minorities should be granted an initial opportunity to bid for any broadcast property required to be divested as a result of any rule adopted in this Docket. Such an approach, we submit, is consistent with the Commission's authority to allocate facilities equitably, to see that all community interests are served by broadcast outlets, and to further First Amendment and competitive objectives. Such an approach is judicially encouraged by the decision in *Florida Heartland Television Inc. v. F.C.C.*, F. 2d (D.C. Cir., November 6, 1973).

For this reason we have included, as part of our proposed divestiture rule, a requirement that any party required to divest a broadcast property under the rule must demonstrate and certify that affirmative actions were taken to assign the property to minority persons, with initial preference to local minority persons, consistent with the Commission's long standing preference for local ownership.

Because of this latter preference, we have also included a third order of priority for divestiture – to non-minority local owners – prior to a sale to a non-local non-minority interest.

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[31] See National Black Media Coalition Petition for Rule-making, RM – , 17-23. (Filed November 12, 1973).

CONCLUSION

For the above reasons, NCCB urges the Commission to face this critical issue squarely, reaffirm its statements as to the seriousness of this problem in its 1970 *Further Notice*, and act quickly to require prophylactic divestiture of outlets in all cross-owned newspaper-television stations. In the alternative, NCCB urges the Commission to adopt a divestiture rule such as that set forth in detail herein and in the Appendix, and to bar all future acquisitions that would create joint newspaper-television combinations.

May 15, 1974

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APPENDIX

RULE

73.636(a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if:

* * *

(3) Such party, or any stockholder, officer or director of such party directly or indirectly owns, operates, controls or has any interest in, or is an officer or director of any daily or weekly newspaper of general circulation in the city of license, or the standard metropolitan statistical area (SMSA) of the city of license, where such properties, taken together with all local broadcast stations, constitute an undue concentration of control of local mass media.

(A) Such properties shall constitute a *per se* concentration of control of the local mass media if they comprise at least 30% of the local mass media outlets for the particular locality, assigning the following criteria for such determination:

(i) For cross-owned newspapers, 40% of its pro rata share of net weekly circulation of all local daily and weekly newspapers of general circulation in the city of license or in the SMSA of the city of license, whichever yields the percentage figure;

(ii) For cross-owned television stations, 40% of its pro rata share of net weekly circulation of all local television stations assigned to the same market; and

(iii) For cross-owned radio stations, 20% of its numerical percentage of the total number of radio stations licensed in the market.

(B) Such properties shall constitute a prima facie concentration of control if they comprise at least 20% of the local mass media outlets for the particular locality, assigning the preceding criteria ((i)-(iii)) for such determination.

(C) The Commission shall designate for hearing all applications which, if granted, would constitute a *prima facie* concentration of control. At such hearing the applicant shall have the burden of demonstrating that a concentration of control of the local mass media would not result from a grant of the application, taking into account the following factors:

(i) The party's ownership of other information disseminating entities which are not included in A) (i)-(iii) above, including national weekly and monthly magazines, non-local newspapers, and other broadcasting stations in the region or nation.

(ii) Joint operating agreements or other economic ties with competing or affiliated newspapers or publications.

(iii) Local or regional economic concentration of control, including advertising revenues and outside economic interests which directly or indirectly bear on the operation of the television station.

(iv) Integration of ownership and management, with the facts of non-local ownership or nonintegrated management bearing against the applicant.

(v) The furthering of First Amendment interests and objectives.

(D) The Commission may at any time and in any case determine that a concentration of control of the local mass media in fact exists if the record facts so warrant, whether or not the total concentration of control exceeds the 20% of local mass media outlets as set forth in (B) above, but its consideration of this question shall in any event be limited to consideration of the factors specified in (C) (i)-(v) above.

* * *

Note 10: Paragraph (a)(3) will apply to all applications for new stations, transfers of control or assignments of license and all major changes in existing stations. Parties which are either per se or prima facie concentrations of control of the local mass media shall be permitted to retain such interests until July 1, 1979. After that date, no television license shall be renewed if a per se concentration of control of the local mass media exists, and those renewal applicants with a prima facie concentration of control shall be set for hearing in accordance with paragraph (a)(3)(c).

* * *

SUPPLEMENT TO NATIONAL ASSOCIATION OF BROADCASTERS EXHIBIT C REGARDING CROSS-OWNERSHIP OF BROADCASTING STATIONS AND NEWSPAPERS [May 1974]

This is a supplementary exhibit and statement by the National Association of Broadcasters (NAB) filed in response to the order of the FCC in the above entitled docket released March 7, 1974. The NAB has filed general comments on the proposed rule, on April 8, 1971 and August 18, 1971. These comments were based on and supported by empirical data reported in NAB Exhibits A to E, also filed in this docket. This supplement will not repeat or review the comments on the proposed rule but presents the results of a further investigation updating the material in NAB Exhibit C, relating to the cross-ownership of broadcasting stations and newspapers in the top 100 markets during the period 1922 to 1967.

Exhibit C presented data showing, inter alia, that from 1950 to 1967 in the top 100 Standard Metropolitan Statistical Areas there was a slight but steady decrease in the concentration of ownership of daily media (i.e. daily newspapers and broadcasting stations), that both media outlets (stations and newspapers) and separate voices (i.e. separate owners) increased faster than the population, and that newspaper affiliation of broadcasting stations decreased sharply, with less than 7% of all broadcasting stations newspaper-affiliated by 1967.

The same investigator (Dr. Christopher H. Sterling), following the same methodology set forth in NAB Exhibit C has now brought the data up to 1970. Attached hereto are thirteen tables corresponding to the tables of NAB Exhibit C and setting forth the same data with the addition of data for the year 1970 (which is the latest year for which data can be secured at this time).

The updating of this exhibit shows that the trends previously observed have been continued, and that the conclusions previously stated have been corroborated.

Since the FCC Order of March 7, 1974 invited the parties to focus primarily on the newspaper-television station cross-ownership proposal, it appears appropriate to draw attention particularly to the following facts.

(A) The total number of media outlets (i.e. stations and newspapers), the total number of separate media voices (i.e. different owners), the total number of broadcast outlets, and the total number of separate broadcast voices have all continued to grow. From 1922 to 1970 the number of broadcast outlets in the top 100 markets increased by 1,062% and the number of broadcast voices increased by 713%.

(B) The number of media outlets and of media voices (i.e. separate media owners) continued to increase faster than the population, so that there were more media outlets per thousand population in 1970 than in any prior year, as well as more separate media voices.

(C) Newspaper control of, or affiliation with, broadcast outlets continued a sharp decline. By 1970 only 4% of broadcast stations were affiliated with newspapers and only 3% of the broadcasters in the top 100 markets were publishers or affiliated with publishers. From1922 to 1940 the percentage of total broadcasters with newspaper affiliations increased, but it has decreased since 1940 and by 1970 the percentage of all broadcasters with newspaper affiliations was lower than it has been in any year since broadcasting began in 1922, by any measure. (See Tables 7 and 8).

The foregoing facts, and the more detailed data set forth in the attached tables updating the tables of NAB

Exhibit C, are largely self-explanatory. However, the NAB has heretofore requested the opportunity to appear and argue orally before the FCC and reserves the right to comment further on the significant of these data, either orally or in writing as may be appropriate.

May 1974

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Table 1: Total Media Outlet/Voice Growth

	Outlets		Voices	
Market Group	Growth Rate	1922 to 1970	Growth Rate	1922 to 1970
Top 10	177%	286 to 793	110%	271 to 569
Top 25	206	436 to 1337	141	401 to 966
Top 50	238	635 to 2152	161	599 to 1566
Top 100	269	877 to 3240	185	829 to 2360

Table 2: Broadcast Outlet/Voice Growth

	Outlets		Voices	
Market Group	Growth Rate	1922 to 1970	Growth Rate	1922 to 1970
Top 10	672%	81 to 625	462%	81 to 455
Top 25	714	134 to 1091	486	134 to 791
Top 50	863	185 to 1781	599	185 to 1293
Top 100	1062	242 to 2724	713	242 to 1965

Table 3: Newspaper Outlet/Voice Decline

	Outlets		Voices	
Market Group	Decline Rate	1922 to 1970	Decline Rate	1922 to 1970
Top 10	−18%	205 to 168	−42%	197 to 114
Top 25	−19	302 to 246	−39	288 to 175
Top 50	−18	450 to 371	−37	434 to 273
Top 100	−18	635 to 521	−34	603 to 396

Table 4: Media Concentration

Market Group	1922	1930	1940	1950	1960	1967	1970
Top 10	.06	.12	.16	.30	.29	.28	.28
Top 25	.08	.12	.18	.32	.29	.28	.27
Top 50	.06	.10	.20	.32	.29	.29	.27
Top 100	.06	.09	.21	.32	.30	.30	.27

Table 5: Broadcasting Concentration

Market Group	1922	1930	1940	1950	1960	1967	1970
Top 10	–	.02	.02	.34	.28	.28	.28
Top 25	–	.03	.04	.33	.29	.27	.27
Top 50	–	.02	.04	.32	.28	.27	.27
Top 100	–	.01	.06	.28	.27	.27	.28

Table 6: Broadcast Independent/Multiple Owners

Market	Outlets				Voices			
Group	1950	1960	1967	1970	1950	1960	1967	1970
Top 10	.37:.63	.50:.50	.50:.50.	.50:.50	.55:.45	.69:.32	.69:.31	.68:.32
Top 25	.40:.60	.48:.52	.50:.50	.51:.49	.53:.43	.62:.35	.68:.32	.69:.31
Top 50	.43:.57	.50:.50	.51:.49	.51:.49	.57:.41	.67:.32	.69:.31	.69:.31
Top 100	.48:.51	.51:.48	.49:.50	.49:.51	.60:.37	.68:.31	.67:.32	.66:.33

Table 7: Newspaper Control of Broadcast Outlets

Market Group	1922	1930	1940	1950	1960	1967	1970
Top 10	.04	.07	.16	.18	.09	.06	.03
Top 25	.08	.11	.21	.20	.08	.07	.03
Top 50	.12	.07	.21	.21	.09	.07	.04
Top 100	.09	.07	.23	.21	.11	.07	.04

Table 8: Newspaper Control of Broadcast Voices

Market Group	1922	1930	1940	1950	1960	1967	1970
Top 10	.09	.07	.17	.15	.07	.04	.03
Top 25	.09	.10	.21	.21	.06	.04	.02
Top 50	.06	.07	.21	.19	.06	.04	.02
Top 100	.05	.07	.23	.19	.08	.05	.03

Table 9: Group-Conglomerate Control of Broadcast Outlets

Market Group	1922	1930	1940	1950	1960	1967	1970
Top 10	.16	.17	.40	.25	.35	.40	.38
Top 25	.10	.11	.40	.19	.32	.37	.34
Top 50	.05	.10	.45	.17	.31	.36	.34
Top 100	.02	.06	.39	.14	.29	.33	.32

Table 10: Group-Conglomerate Control of Broadcast Voices

Market Group	1922	1930	1940	1950	1960	1967	1970
Top 10	.15	.15	.37	.18	.29	.32	.30
Top 25	.09	.09	.39	.15	.27	.30	.28
Top 50	.04	.09	.42	.14	.27	.31	.29
Top 100	.05	.07	.41	.12	.25	.30	.28

Table 11: Growth of Broadcast Voice Combinations

Market	1950		1960		1967		1970	
Group	AM-FM	R-TV	AM-FM	R-TV	AM-FM	R-TV	AM-FM	R-TV
Top 10	66	26	72	37	86	46	90	53
Top 25	100	44	113	75	155	78	169	83
Top 50	153	65	159	130	238	134	267	137
Top 100	228	84	215	218	356	215	408	217

Table 12: Media Outlets Per 1000 Population

Market Group	1920	1930	1940	1950	1960	1967	1970
Top 10	.018	.014	.011	.016	.018	.019	.019
Top 25	.024	.016	.013	.018	.022	.022	.027
Top 50	.026	.018	.016	.024	.028	.029	.032
Top 100	.028	.021	.020	.031	.036	.040	.046

Table 13: Media Voices Per 1000 Population

Market Group	1920	1930	1940	1950	1960	1967	1970
Top 10	.017	.012	.010	.011	.013	.014	.013
Top 25	.022	.014	.011	.012	.015	.016	.016
Top 50	.026	.013	.014	.016	.020	.021	.021
Top 100	.027	.017	.017	.020	.025	.028	.029

SUPPLEMENTAL STATEMENT OF NATIONAL ASSOCIATION OF BROADCASTERS AND EXHIBIT F REGARDING RECENT TRANSFERS OF BROADCASTING STATIONS (REVISED) [May 1974]

The National Association of Broadcasters (NAB hereby submits Exhibit F (revised), as an addition and supplement to the exhibits and statements heretofore filed in the above entitled docket by the NAB, in response and pursuant to the order of the Commission in said docket released March 7, 1974.

This revised statement and exhibit is filed to supersede the supplemental statement and Exhibit F recently filed in order to correct two typographical errors which appeared in tables 1 and 3. Both errors were minor, the change in data is not substantial, and the conclusions are not affected. However, in the interest of attaining the greatest accuracy which time and circumstances permit, the NAB desires to substitute this revised statement and Exhibit F for the one previously filed.

The NAB calls attention to the comments on the proposed rule filed herein by the NAB on April 8, 1971, and August 18, 1971, and to NAB Exhibits A to E, that contained a mass of empirical data upon which the comments were based. The NAB also calls attention to the Supplement to Exhibit C, recently filed pursuant to the FCC March 7th Order. This demonstrates unequivocally that both media cross-ownership and concentration of media ownership declined from 1950 to 1970 and that broadcasting-newspaper affiliations are at an historic low point, constituting a smaller percentage of

broadcasting licensees or stations than at any time since the beginning of broadcasting in 1922.

In order to insure that the empirical data on which its comments are based continue to be valid and completely current, the NAB has further undertaken a study of all applications for broadcast licenses and license transfers reported during the period July 6, 1970, to April 14, 1974. The methodology of that study is reported in the "Appendix" attached hereto, and the results are reported in tables A-1 and A-2 and tables 1, 2, and 3, attached hereto.

The Appendix and annexed tables comprise NAB Exhibit F (revised) and are self-explanatory. They show the following data:

Table A-1 — Television stations affiliated with newspapers in their respective cities of publication as of April 15, 1974.

Table A-2 — Radio stations affiliated with newspapers in their respective cities of publication as of April 15, 1974.

Table 1 — Applications for new broadcasting stations, July 6, 1970 to April 14, 1974, classified by applicant's other media interests.

Table 2 — Applications for station transfers, July 6, 1970 to April 14, 1974, classified by seller's (transferor's) other media interests.

Table 3 — Applications for station transfers, July 6, 1970 to April 14, 1974, classified by buyer's (transferee's) other media interests.

Analysis of the data presented in this exhibit shows that the trend away from cross-media ownership or affiliation has continued to the present. Out of a total

of 654 applications for new station licenses, only 3 were by newspaper affiliated applicants, and in each of these cases the applicant had an AM license and was seeking a companion FM license. Disregarding applications involving changes of facilities within a community and AM-FM combinations, which the FCC now expressly permits, only 5 applications out of a total of 654 involved media affiliated applicants.

The data relating to transfer applications are even more dramatic in showing the trend away from multi-media affiliation in single markets. Newspapers were sellers of broadcast interests in 35 applications for transfer and were buyers in only two. Both newspaper buyers were seeking to purchase AM stations – none sought to purchase television stations. Television-affiliated licensees were sellers in 19 transfer applications, and not a single television affiliated licensee was a buyer. Disregarding AM-FM combinations and exchanges of similar facilities within a community, out of a total of 1,062 transfer applications during the period studied only a single one involved the acquisition of a broadcasting license by an applicant with other media affiliations in the community. That single exception was a newspaper affiliated applicant which sought to acquire an AM station.

This exhibit, together with the material previously filed herein by the NAB, shows beyond any possibility of a reasonable doubt that the trend toward market deconcentration, or the holding of licenses by licensees without other media interests in the same market, is continuing to the present time. These exhibits and supplementary data thus strongly corroborate the conclusions previously drawn from the exhibits filed by the NAB, and set forth in the NAB comments on the proposed rule. In addition to all the objections to the proposed rule

previously specified by the NAB, the present studies and data show conclusively that there is no need or occasion for further consideration of the proposed rule. Every objective that has been urged as a purpose or justification of the proposed rule is being achieved by economic market forces operating within the framework of present FCC rules and regulations.

In addition to the numerous other reasons against adoption of the proposed rule, the current data show that it it is quite needless and would be futile.

(Certificate of Service Omitted in Printing]

APPENDIX

1. *Broadcasting* magazine's "For the Record" was examined for the period July 6, 1970, to April 14, 1974, to determine activity related to ownership of new stations and changes in ownership of existing stations. For all applications for new TV, AM, and FM stations, the following data were recorded: medium; market; application date; final action date; owner(s); and other broadcasting interests held by the owner(s). For applications for ownership changes, these data were recorded: medium; market; call letters; application date; final action date; nature of transaction (e.g., transfer of control, transfer of license); seller(s); other broadcasting interests of seller's ; buyer's); and other broadcasting interests of buyer's).

2. A list of broadcast stations presently in common ownership with a newspaper in the same community was constructed (see Tables A-1 and A-2). The primary source of data for constructing the list was "Broadcast Stations Identified with Newspaper or Magazine Ownership," in the 1974 *Broadcasting Yearbook*. This was supplemented by examining the 1973 *Editor & Publisher*

Year Book "Surveys of Daily Newspapers Published in the United States" for broadcast affiliate listings, or other indications of affiliation of a broadcast station with a newspaper in the same community.

3. For applications for transfer of ownership, ownership interest in other media in the same community were then coded. Ownership interest in other broadcast media was determined by referring to ownership data taken from "For the Record." Newspaper affiliation of the seller (if not indicated in "For the Record") was determined by referring to a 1971 list of newspaper-affiliated broadcast properties; newspaper affiliation of the buyer was determined (if not indicated in "For the Record") by reference to the current list of newspaper-affiliated stations described in the preceding paragraph.

For new applications, ownership interests of the applicant in other media in the community were similarly determined by referring to the ownership data taken from "For the Record" and to the current list of newspaper-affiliated stations.

4. Limitations of the data: These procedures produced data that are subject to error for various reasons. The source data were found in some instances to be incorrect or incomplete; where such instances were noticed, corrections were made, but it is unrealistic to think that all such errors were detected. In addition, the sheer volume of information that was processed, and the relatively short time in which it was done, undoubtedly resulted in additional errors being made. The numbers reported in Tables 1, 2, and 3 may not, therefore, be absolutely accurate. Any such errors should not, however, affect the orders of magnitude reported in the tables, and hence should not affect the conclusions drawn from the tables.

TABLE A-1

Television Stations Affiliated with Newspapers in City of Publication (As of April 15, 1974)

State	*City*	*Call Letters*
Alabama	Anniston	WHMA-TV
	Birmingham	WAPI-TV
Arkansas	Little Rock	KTHV(TV)
California	Fresno	KMJ-TV
	Sacramento	KOVR (TV)
	San Francisco	KRON-TV
Colorado	Denver	KHBC (TV)– Construction Permit only
District of Columbia	Washington	WMAL-TV
	Washington	WTOP-TV
Florida	Tampa	WFLA-TV
Georgia	Albany	WALB-TV
	Atlanta	WSB-TV
Idaho	Idaho Falls	KIFI-TV
Illinois	Champaign	WCIA (TV)
	Chicago	WFLD-TV
	Chicago	WGN-TV
	Quincy	WGEM-TV
	Rock Island	WHBF-TV
Indiana	Bloomington	WTTV (TV)
	Elkhart	WSJV (TV)
	South Bend	WSBT-TV
	Terre Haute	WTHI-TV
Iowa	Cedar Rapids	KCRG-TV
	Des Moines	KRNT-TV
	Mason City	KGLO-TV
Kansas	Topeka	WIBW-TV
Kentucky	Louisville	WHAS-TV
	Paducah	WPSD-TV
Louisiana	Baton Rouge	WBRZ (TV)
	Shreveport	KSLA-TV
Maine	Portland	WGAN-TV
Maryland	Baltimore	WBAL-TV
	Baltimore	WMAR-TV
Michigan	Detroit	WWJ-TV

State	*City*	*Call Letters*
Minnesota	Duluth-Superior, Wisc.	WDSM-TV
	Minneapolis	WCCO-TV
Mississippi	Columbus	WCBI-TV
	Jackson	WJTV (TV)
	Meridian	WTOK-TV
Missouri	Joplin	KOAM-TV
	St. Louis	KSD-TV
	St. Louis	KTVI (TV)
	Springfield	KYTV (TV)
Nebraska	Hastings	KHAS-TV
	Omaha	KETV (TV)
Nevada	Las Vegas	KORK-TV
New York	Buffalo	WBEN-TV
	New York	WPIX (TV)
	Rochester	WHEC-TV
	Syracuse	WSYR-TV
	Watertown	WWNY-TV
North Carolina	Greensboro	WFMY-TV
	Hickory	WHKY-TV
North Dakota	Fargo	WDAY-TV
Ohio	Akron	WAKR-TV
	Cincinnati	WCPO-TV
	Cleveland	WEWS (TV)
	Columbus	WBNS-TV
	Dayton	WHIO-TV
	Youngstown	WFMJ-TV
	Zanesville	WHIZ-TV
Oklahoma	Oklahoma City	WKY-TV
Oregon	Portland	KOIN-TV
Pennsylvania	Erie	WSEE (TV)
	Harrisburg	WTPA (TV)
	Johnstown	WJAC-TV
	Lancaster	WGAL-TV
South Carolina	Anderson	WAIM-TV
	Greenville	WFBC-TV
Tennessee	Memphis	WMC-TV
Texas	Dallas	KDFW-TV
	Dallas	WFAA-TV
	Houston	KPRC-TV
	San Antonio	KENS-TV
	Temple	KCEN-TV
	Texarkana	KTAL-TV

State	*City*	*Call Letters*
Utah	Salt Lake City	KSL-TV
Virginia	Norfolk	WTAR-TV
Washington	Spokane	KHQ-TV
West Virginia	Bluefield	WHIS-TV
Wisconsin	Milwaukee	WTMJ-TV
	Wausau	WSAU-TV

TABLE A-2

Radio Stations Affiliated with Newspapers in City of Publication (As of April 15, 1974)

State	*City*	*Call Letters*
Alabama	Anniston	WHMA-AM-FM
	Birmingham	WAPI-AM-FM
Arkansas	Camden	KAMD/KWEH (FM)
	Fort Smith	KFSA
	Hope	KXAR
California	Fresno	KMJ-AM-FM
	Modesto	KBEE-AM-FM
	Sacramento	KFBK-AM-FM
	San Francisco	KRON-FM
	San Rafael	KTIM-AM-FM
	Santa Barbara	KTMS-AM-FM
	Santa Cruz	KSCO-AM-FM
	Santa Rosa	KSRO
Connecticut	Stamford	WSTC-AM-FM
District of Columbia	Washington	WMAL-AM-FM
	Washington	WTOP
Florida	Miami	WIOD/WAIA (FM)
	Tampa	WFLA-AM-FM
Georgia	Atlanta	WSB-AM-FM
Hawaii	Honolulu	KOHO
Idaho	Couer d'Alene	KVNI
Illinois	Bloomington	WJBC/WBNQ-FM
	Canton	WBYS-AM-FM
	Champaign	WDWS-AM-FM
	Chicago	WGN

State	*City*	*Call Letters*
	Decatur	WSOY-AM-FM
	Effingham	WCRA-AM-FM
	Galesburg	WGIL-AM-FM
	Jacksonville	WLDS/WEAI (FM)
	Kankakee	WKAN
	LaSalle	WLPO-AM-FM
	Macomb	WKAI-AM-FM
	Quincy	WGEM-AM-FM
	Rock Island	WHBF-AM-FM
	Urbana	WPGU-(FM)
	Waukegan	WKRS
Indiana	Bloomington	WTTS/WTTV-FM
	Connersville	WCNB-AM-FM
	Elkhart	WTRC/WFIM (FM)
	Fort Wayne	WGL
	South Bend	WSBT-AM-FM
	Terre Haute	WTHI-AM-FM
	Vincennes	WAOV-AM-FM
	Warsaw	WRSW-AM-FM
Iowa	Burlington	KBUR-AM-FM
	Cedar Rapids	KCRG
	Des Moines	KRNT-AM-FM
	Dubuque	KDTH/KFMD (FM)
	Marshalltown	KFJB-AM-FM
	Mason City	KGLO
Kansas	Arkansas City	KSOK
	Coffeyville	KGGF
	Dodge City	KGNO-AM-FM
	Garden City	KIUL
	McPherson	KNEX-AM-FM (FM is not on the air)
	Manhattan	KMAN/KMKF-FM
	Topeka	WIBW-AM-FM
Kentucky	Bowling Green	WKCT/WDNS (FM)
	Corbin	WCTT-AM-FM
	Louisville	WHAS-AM-FM
	Middlesboro	WMIK-AM-FM
	Owensboro	WOMI/WBKR (FM)
Louisiana	Baton Rouge	WJBO-AM-FM
	Shreveport	KWKH/KROK (FM)
Maine	Portland	WGAN-AM-FM

State	*City*	*Call Letters*
Maryland	Baltimore	WBAL-AM-FM
	Baltimore	WMAR-FM
Massachusetts	Brockton	WBET-AM-FM
	Northhampton	WHMP-AM-FM
	Worcester	WTAG
Michigan	Albion, Marshall	WALM-AM-FM
	Benton Harbor	WHFB-AM-FM
	Detroit	WWJ-AM-FM
	Jackson	WIBM/WBBC (FM)
	Owosso	WOAP-AM-FM
	Saginaw	WSGW/WSBM (FM)
Minnesota	Duluth-Superior, Wisc.	WDSM
	Minneapolis	WCCO-AM-FM
	New Ulm	KNUJ-AM-FM
	St. Cloud	KFAM-AM-FM
Mississippi	Columbus	WCBI
	Greenville	WDDT
	Jackson	WSLI-AM-FM
	Meridian	WMOX
Missouri	Brookfield	KGHM
	Columbia	KFRU
	Festus	KJCF
	St. Louis	KSD
	Springfield	KGBX
	Warrensburg	KOKO
Montana	Miles City	KATL
Nebraska	Hastings	KHAS
	Norfolk	WJAG-AM-FM
Nevada	Las Vegas	KORK-AM-FM
New Jersey	Asbury Park	WJLK-AM-FM
New Mexico	Grants	KMIN
New York	Buffalo	WBEN-AM-FM
	New York	WPIX-FM
	New York	WQXR-AM-FM
	Olean	WHDL-AM-FM
	Syracuse	WSYR-AM-FM
	Watertown	WWNY
North Carolina	Asheboro	WGWR/WCSE (FM)
	Asheville	WWNC
	Durham	WDNC-AM-FM
	Hickory	WHKY-AM-FM

State	*City*	*Call Letters*
North Dakota	Fargo	WDAY-AM-FM
Ohio	Akron	WAKR/WAEZ (FM)
	Ashtabula	WREO-AM-FM
	Columbus	WBNS-AM-FM
	Dayton	WHIO-AM-FM
	Elyria	WEOL/WBEA)FM)
	Findlay	WFIN-AM-FM
	Nelsonville	WNAL (not on the air)
	Newark	WCLT-AM-FM
	Warren	WHHH
	Wooster	WWST-AM-FM
	Youngstown	WFMJ
	Zanesville	WHIZ-AM-FM
Oklahoma	Ardmore	KVSO
	Durant	KSEO-AM-FM
	Enid	KCRC-AM-FM
	Muskogee	KBIX
	Oklahoma City	WKY
	Ponca City	WBBZ
	Shawnee	KGFF
	Stillwater	KSPI-AM-FM
Oregon	Grants Pass	KAGI
	Portland	KOIN-AM-FM
Pennsylvania	Bedford	WBFD/WAKM (FM)
	Clearfield	WCPA-AM-FM
	DuBois	WCED-AM-FM
	Easton	WEEX/WQQQ (FM)
	Gettysburg	WGET-AM-FM
	Harrisburg	WTPA-FM
	Huntingdon	WHUN-AM-FM
	Johnstown	WJAC-AM-FM
	Lancaster	WGAL-AM-FM
	Lansdale	WNPV
	Lewistown	WMRF-AM-FM
	Philadelphia	WPBS (FM)
	Pittsburgh	WWSW/WPEZ (FM)
	Reading	WEEU
	Scranton	WEJL-AM-FM
Rhode Island	Providence	WEAN/WPJB-FM
	Woonsocket	WWON-AM-FM
South Carolina	Anderson	WAIM/WCAC (FM)
	Greenville	WFBC-AM-FM
	Orangeburg	WTND

State	*City*	*Call Letters*
South Dakota	Aberdeen	KSDN
Tennessee	Johnson City	WETB
	Knoxville	WNOX
	Memphis	WMC-AM-FM
Texas	Conroe	KMCO/KNRO-FM
	Dallas	WFAA/KZEW (FM)
	Houston	KPRC
	Temple	KTEM
	Texarkana	KCMC/KTAL-FM
Utah	Salt Lake City	KSL-AM-FM
Virginia	Fredericksburg	WFLS-AM-FM
	Newport News	WGH-AM-FM
	Norfolk	WTAR-AM-FM
Washington	Spokane	KHQ-AM-FM
	Tacoma	KTNT-AM-FM
West Virginia	Bluefield	WHIS-AM-FM
	Morgantown	WAJR-AM-FM
Wisconsin	Antigo	WATK-AM-FM
	Janesville	WCLO/WJVL (FM)
	Madison	WIBA-AM-FM
	Milwaukee	WTMJ-AM-FM
	Shawano	WTCH-AM-FM
	Wausau	WSAU/WIFC (FM)
	Wisconsin Rapids	WFHR/WWRW (FM)
Wyoming	Cheyenne	KFBC-AM-FM
	Rock Springs	KVRS
Puerto Rico	San Juan	WKAQ-AM-FM

TABLE 1

Applications for New Stations – Classified by Applicant's Other Media Interests
(As reported in *Broadcasting*, July 6, 1970, to April 14, 1974)

	Type of Station Applied for				
Applicant Interest(s) in Same Community	TV	AM	FM	AM/FM	Total
Newspaper/AM			3		3
AM	1	1	179		181
FM	3				3
TV/AM			1		1
None	35	64	366	1	466
Total	39	65	549	1	654

TABLE 2

Applications for Transfers – Classified by Seller's Other Media Interests*
(As reported in *Broadcasting*, July 6, 1970, to April 14, 1974)

	Type of Station Sold							
Seller Interest(s) in Same Community	TV	TV/AM	TV/FM	TV/AM/FM	AM	FM	AM/FM	Total
Newspaper	3			1	18	3	6	31
Newspaper/TV/AM						2		2
Newspaper/AM	1							1
Newspaper/AM/FM	1							1
Television					7	6	3	16
TV/AM						1		1
AM	1					16		17
FM					10			10
AM/FM	11							11
None	55	2	1	1	531	205	177	972
Total	72	2	1	2	566	233	186	1062

*See Table 3 for applications classified by buyer's other media interests.

TABLE 3

Applications for Transfers – Classified by Buyer's Other Media Interests*
(As reported in *Broadcasting*, July 6, 1970, to April 14, 1974)

	Type of Station Purchased							
Buyer Interest(s) in Same Community	TV	TV/AM	TV/FM	TV/AM/FM	AM	FM	AM/FM	Total
Newspaper					1			1
Newspaper/FM					1			1
AM					1	28		29
FM					6			6
None	71	2	1	2	558	204	187	1025
Total	71	2	1	2	567	232	187	1062

*See Table 2 for applications classified by seller's other media interests.

FURTHER COMMENTS OF THE PULITZER PUBLISHING COMPANY AND KSD/KSD-TV INC. [May 15, 1974]

The Pulitzer Publishing Company ("Pulitzer"), publisher of the *St. Louis Post-Dispatch*, and KSD/KSD-TV Inc., a wholly owned subsidiary of Pulitzer and licensee of a standard broadcast (KSD) and television station (KSD-TV) located in St. Louis, Missouri, file these further comments, by their attorneys, in response to the proposed rules outlined by the Commission in the Further Notice of Proposed Rule Making adopted March 25, 1970, 22 F.C.C. 2d 339, and to the questions set forth in the Commission's Memorandum Opinion and Order adopted February 28, 1974. With reference to the proposed rule, Pulitzer and its broadcast licensee show:

1. Pulitzer filed its initial comments dated May 17, 1971 in this proceeding, opposing any restriction upon the common ownership, operation or control of a broadcast facility and a daily newspaper in the same geographic market. Pulitzer and its subsidiary adopt and support the comments filed by the American Newspaper Publishers Association, dated April 2, 1971.

Arguments of the Department of Justice

2. The Department of Justice and others have attempted to urge upon the Commission the adoption of a rule which incorporates the economic concerns of the Department and which expand upon antitrust law and policy as evidenced in the antitrust statutes which the Department enforces. The experience of Pulitzer and KSD-TV is that cross-ownership of newspapers and broadcast media in St. Louis has been beneficial to the

public as well as the licensees. Pulitzer's broadcasting background is, in addition to St. Louis, in Albuquerque, New Mexico, and Tucson, Arizona. The catalogue of technological and creative advances produced through cross-ownership is lengthy, and includes the obvious capability to underwrite developing but temporarily unprofitable innovations in either broadcast or print media by shared profits and losses. In this connection we adopt and incorporate herein Part 1 of the Further Comments of the Evening News Association et al., dated May 1, 1974, pages 3 to 10, particularly to the effect that the Department of Justice's emphasis on antitrust and antimerger criteria must be weighed against the Commission's broad responsibility to maintain the best available broadcasting service and that in the absence of any showing of actual harm resulting from newspaper ownership of "colocated" TV stations, the Commission should not disqualify the one class of licensees and potential licensees – newspaper publishers – "who are by experience, style, and professional qualification the most competent by nature to produce the quality of broadcast service to the public which the Commission seeks . . . ." (*Id.* at 10.) We also point to the recent statements of the House Committee on Interstate and Foreign Commerce:

> ". . . (I)t is unfair and unsound to oust a broadcast licensee on grounds of cross-ownership . . . when the license was granted to it with full awareness of the cross-ownership. . . .
>
> "Notwithstanding the broad prohibition stated in paragraph 34 (of the Further Notice of Proposed Rule Making, adopted March 25, 1970), the committee is of the view that the Commission, in connection with any rules it may adopt, could take into account, among other things, such

> factors as the size of the market in question; the other interests of the ownership; the number of broadcast stations in the market; the other communications media, such as newspapers and cable systems in the market; the extent to which other broadcast signals are received in the market, the circulation of newspapers in the market which are published outside thereof; and the extent which there is concentration of media control as reflected by various other factors." (H. R. Rep. No. 93-961, 93d Cong. 2d Sess. 19 (1974))[1]

3. The petitions filed by the Department of Justice asking the Commission to deny renewal applications for KSD and KSD-TV and for KTVI(TV) in St. Louis and similar petitions for other stations similarly situated demonstrate the unfairness of the Department's position. The Department has consciously avoided any allegation of wrongdoing or less than superior broadcasting performance by licensees in these cases with a view to obtaining a *per se* rule that ownership of a TV broadcasting station by a local newspaper publisher is in itself unlawful without more. We attach as Exhibits 1 and 2 the Department's Petition and the Opposition of Pulitzer and its subsidiary in which, we submit, we have shown to the point of demonstration that the Department of Justice has in that proceeding attempted to do indirectly what it cannot do directly and to apply the antitrust laws to circumstances which are clearly outside the intent and scope of the language of those laws. The Commission has the authority, and has exercised that authority in the past, to remedy any

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[1]The bill reported by the House Committee was overwhelmingly passed by the House and sent to the Senate on May 1, 1974.

danger which might arise from an undue concentration of economic power *accompanied by abusive competitive practices* in the context of adjudicatory proceedings at renewal time or upon order to show cause during the renewal term. In addition, the Department may initiate a plenary and separate antitrust action at any time in its sole discretion. (*See* Opposition (Ex. 2), pp. 56-58.). Thus, the Commission and the Department already possess sufficient authority under the Act to discover and subject to administrative sanction any broadcaster who does not abide by the minimum standards of competitive conduct in the market place. We believe that the Commission's existing policies and procedures have been effective to prevent harm to the public interest, and the Commission has been assiduous in exercising that authority. There has been no showing to the contrary.

4. Aside from the predominant questions of broadcast communications policy for which the Commission has exclusive jurisdiction under the Communications Act of 1934 (47 U.S.C. §§301-330), "the Department [of Justice], not the Commission, has the primary responsibility by use of its customary procedures under the antitrust laws to guarantee that competition remains free of unlawful restraints, monopolies, monopolization, mergers, and acquisitions." (Opposition (Ex. 2), p. 39; *see generally* Opposition (Ex. 2), pp. 37-42.) These laws have been carefully prescribed and limited in their application by the courts.

5. The Department now seeks, however, to have the Commission adopt and apply concepts of the antitrust laws which go far beyond the intent of Congress in enacting those laws. As shown in our Opposition, Clayton Act §7 (15 U.S.C. §18) only applies to

mergers or stock or asset acquisitions and the statute therefore is untenable with respect to Pulitzer's broadcasting operations in St. Louis where Pulitzer pioneered in radio broadcasting in 1922 with KSD and in 1947 with KSD-TV. Expansion by internal growth has been favored under the antitrust laws and this has generally been the means by which local newspaper publishers obtained their broadcast licenses. Sherman Act §2 (15 U.S.C. §2) requires not only a showing of monopoly power in the relevant market by the defendant, but also an acquisition or maintenance of that power by unlawful means. (Ex. 2, pp. 46-58.). While the Commission should take into consideration the effect of the antitrust laws in its broadcast licensing function, that duty should persuade the Commission not to adopt a rule, in Pulitzer's case as well as others, condemning its operation of two broadcast stations in St. Louis from 1922 and 1947 which resulted from internal growth and in consonance with antitrust law and policy.[2]

6. As a corollary of its attempt to establish a *per se* cross-ownership rule, the Department ignores the Congressional intent evidenced by the Newspaper Preservation Act (15 U.S.C. §§1801-05), by requesting the Commission to consider the alleged anticompetitive effect of joint newspaper operating arrangements in various cities, such as St. Louis. This same position was urged in *Chronicle Broadcasting Co.*, 40 F.C.C. 2d 775,

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[2]If the proposed rule were adopted, Pulitzer and its broadcasting subsidiary and others would, of course, retain the right, guaranteed by the *United States v Storer Broadcasting Co.*, 351 U.S. 192 (1956), to request an adjudicatory hearing on the application or waiver of such rule in light of their operation of these stations in close compliance with antitrust law and policy.

795 (1973). The Commission noted that these arrangements and the Act were adopted to preserve the existence of at least two or more daily newspapers in twenty-two cities, by permitting the efficient use of joint production facilities and certain joint commercial activities, and held that consideration of these publishing arrangements to evidence over-concentration of ownership is improper under the Newspaper Preservation Act. In adopting any rule, it is suggested that the Commission carry this principle into the rule so that operation under a joint newspaper arrangement pursuant to the Newspaper Preservation Act may not be considered for purposes of the rule. (*See* Opposition (Ex. 2), pp. 59-71.)

7. In light of the public interest standard of the Communications Act and the General antitrust policies subsumed under that standard, and only cross-ownership rule that appears within the limits of the Commission's authority is that suggested by the Supreme Court in a dictum in *United States v. Radio Corp. of America,* 358 U.S. 334, 351-52 (1959), barring the publisher of the sole newspaper in an area from acquiring the sole TV or radio station in the same area. Indeed, the Department's Petition (Ex. 1, p. 7) relies heavily upon this dictum. Only two years ago, for example, the Commission permitted the transfer of a standard broadcast license to the publisher of two daily newspapers in Festus and Crystal City, Missouri, within the urban St. Louis market, pointing out that there are two daily newspapers and two standard broadcast stations in Festus in addition to area weekly newspapers and other broadcast media serving Festus". *United Broadcasting, Inc.*, 36 F.C.C. 2d 695, 698-99 (1972). The extension of any *per se* rule forbidding cross-

ownership in a city where there are presently two or more VHF-TV stations or two or more daily newspapers would by no means assure that the new operator of the divested TV license would be someone equally qualified, in other respects, to the present newspaper publisher licensee. In fact, the contrary might be true. As an example of this and the positive benefits of newspaper ownership, we cite two examples based on a review of experience in Tucson, Arizona. As the Commission is aware, Pulitzer was required to divest KVOA-TV, Tucson, as a result of a consent order which Pulitzer entered into when it acquired the *Arizona Star,* one of the two Tucson daily newspapers. The reports of the American Research Bureau show that the average share of audience for local news programming on KVOA-TV dropped significantly after new owners acquired the station from Pulitzer. On the other hand, television station KOLD-TV in Tucson, owned by the *Evening News Association,* a non-local newspaper group and the licensee of WWJ-TV, Detroit and other stations, increased markedly during the same period, November, 1972 to March, 1974.[3] This suggests the possibility, which would have to be based on a broad survey made by the Commission, that the benefits of newspaper ownership – local and non-local – should be fully considered.

9. In any event, as will appear below, the advent and growth of cable TV may make it inappropriate and unfair at this time to adopt a rule, even as suggested above, requiring wholesale divestiture which may not, in the light of probable future events, have been necessary.

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[3] ARB, Program Audiences, Average TV Household Share, November, 1972 and February-March, 1974.

10. The 1970 Further Notice of the Commission, ordering further consideration of the issue of cross-ownership of daily newspaper and TV stations in the same market, was based on the consensus of factual studies in the record "that the public looks primarily to these two sources (daily newspapers and TV) for its news and information on public affairs". (22 F.C.C. 2d at 344.) This public predilection was found by these studies to have existed at least as early as the fifties. (*Ibid.*) Against this historic pattern of TV and newspaper dominance of the communications media, a recent Stanford Research Institute study projects the growth of cable-TV and over-the-air-pay-TV to 1.5 million households in 1976 and more than 25 million in 1985. "According to the study, the over-the-air form of pay-TV is expected principally to develop in the top 50 markets during the nineteen seventies, while cable-TV markets would predominate in the rest of the country". (*New York Times,* April 17, 1974, reporting on a Stanford Research Institute study entitled *The Outlook for Cable Television* (1974). The advent of cable or pay-TV as the third major medium of communications is also predicted by the Cabinet Committee on Cable Communications in its report entitled *Cable: Report to the President,* submitted January 14, 1974. In the report of this committee, chaired by Clay T. Whitehead, Director of the Office of Telecommunications Policy, it is found that, "Cable has the technical potential to become a communications medium of abundant capacity, with almost a limitless number of channels capable of carrying virtually any kind of communications". (*Id.* at 9). The report also outlines the growth of cable TV "to an industry composed of over 3,000

systems in 1973, connecting almost 8 million households and continuing to grow at a rate of more than ten per cent per year," (*Id.* at 11)

11. The Cabinet Committee's report advocates a different regulatory approach to cable-TV based on the multiplicity of channels. Because of the abundance of channels in cable-TV compared to the number of channels physically available in broadcast TV, the Cabinet Committee advocates a simple legislative solution, namely, the prohibition of integration of the programming and distribution functions of the cable-TV operation. (*Id.* at 22-25)

> "... [I]n the long run, cable development could alter significantly the competitive relationships among the broadcast and print media and the cable industry. It would not consititute economic protectionism to give some consideration to those industries, especially television broadcasting, that would bear the brunt of technological innovation and competition from a successful cable industry. Broadcasters and publishers should have an opportunity to own or invest in cable systems in the communities they serve without being required to divest themselves of their present media holdings in those markets. Although broadcast stations would thus be allowed to a limited extent to engage in both program origination and cable operation in the same community, they would still be bound by all the restrictions on program control placed on cable operations. There would, of course, be no prohibition against broadcasters or newspaper publishers owning cable systems outside the markets they already serve with these other media outlets.
>
> "It is reasonable to expect that most broadcasters and publishers would prefer to offer

programming on cable channels that they lease rather than to own cable systems, and that should be allowed. On balance, the separations policy, with its assurance of access by channel users, considerably lessens any potential harm which may arise from the cross-media ownership of cable systems. Therefore, no special restrictions on such cross-ownership appear to be necessary. Excessive concentrations of cross-media ownership would, however, be prohibited by normal operation of the antritrust laws as would excessive concentration of control over broadcast-newspaper-cable channel content." (*Id.* at 32)[4]

Since all indications point to a growing multiplicity of mass-media communications voices in the near future, whether or not the Cabinet Committee's recommendations are adopted, it is suggested that caution should be exercised in the adoption of a rule disqualifying a whole class of the most qualified and experienced broadcasters.

Adverse Effects of Barring Cross-Ownership

12. A complete separation of newspaper and TV ownership in the same locality may lead to a counter-productive antagonism between newspapers and

[4]This report, as well as the Stanford report, confirm the strongly-held view of former Chairman Dean Burch that "providing the regulatory climate which will assure implementation of program origination by CATV systems (including channels for common carrier usage), over-the-air pay-TV, use of satellites for new broadcast and cable networks, and a really properly financed educational service, should be assigned top priority, because that is by far the best and most effective way of obtaining maximum diversity of programming." (22 F.C.C. 2d at 350.)

TV as complementary communications media, contrary to federal communications policy. An analogy may be made to the history and effect of the similar prohibition against common ownership of railroads and truckers, which contributed to mutually destructive competition between these two transportation modes and the decline of the railroads.[5]

13. In light of the complementary nature of the media and the historic development of many TV stations by local newspaper publishers, recognition should be given to the fact that the media are as complementary as they are competitive, and that the erection of a wall between them will deter the cross-semination of ideas and technology. For example, there is talk about electronic cross-country telecommunications between news offices and printing plants (e.g., the *Wall Street Journal* is printed simultaneously with local variations in major cities). Facsimile printing of local newspapers and weather reports through cable-TV in each home is being forecast. If print media and broadcast and cable are separated, the important new technology may be hindered.

[5]Strong criticism has been directed recently at the ICC for its administration of its authority to regulate common ownership of railroads and motor carriers in that the general promotion of intermodal competition deters intermodal coordination and may have helped cause railroad bankruptcies. *See* L. Schwartz, *Free Enterprise and Economic Organization* 261-62 (4th ed. 1972); 2 A. Kahn, *The Economics of Regulation* 264 (1971); Helmetag, *Common Ownership of Rail and Motor Carriers; The Case for the Railroads*, 48 Tex. L. Rev. 889 (1970). If these criticisms of ICC policy are correct, the lesson is obvious: the prohibition of common ownership of newspapers and TV stations may, in overpromoting intermedia competition, also deter intermedia coordination, and lead to the further decline of daily newspapers.

14. If divestiture is not ordered by the Commission and a modified rule were adopted prohibiting new TV-newspaper combinations and requiring the separate sale of such combinations, such modified rule could not be justified unless there were: (1) a sufficient factual record, (2) overriding governmental interests, and (3) lack of practical alternatives, which would justify such a rule. As the House Committee stated, ". . . it is unfair and unsound to oust a broadcast licensee on grounds of cross-ownership. . ." Forced divestiture of either or both licenses of the broadcasting subsidiary would entail severe financial detriment to Pulitzer that cannot be controverted in light of Pulitzer's history of broadcasting operations, subsidized in the early years by its newspaper revenues. And this is equally applicable to a rule which would compel separate sale at some future date. The financial interdependence of Pulitzer's newspaper and broadcasting operations in St. Louis for over fifty-two years has provided a stability which should not be destroyed either by forced divestiture or by separate sale.[6]

15. For the reasons set forth herein, Pulitzer and its subsidiary, after serious study, and based upon many years of experience, believe that the Commission's proposed rule making is contrary to important factual considerations. The proposed rules would be unlawful, unnecessary and adverse to the public interest.

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[6]This point was made most strongly by former Chairman Dean Burch summarizing the view of Commissioner Robert E. Lee "concerning the stability of the newspaper owner – that such an owner does not 'traffick' and does a better job of serving as an outlet for local expression." (22 F.C.C. 2d at 350.)

REPLY COMMENTS OF POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.

[June 17, 1974]

In its Supplemental Comments in this proceeding filed May 15, 1974, the Justice Department contends that a commonly owned television station and newspaper in the same market will charge higher advertising rates than would be charged if they were separately owned. We believe this contention is wrong in theory, and studies recently made by Post-Newsweek Stations (PNS) show that it is without valid factual support.

The principal basis for the Justice Department's contention is a series of theoretical assumptions about newspaper and television advertising – namely, that newspapers and television stations are direct competitors for most of their advertising revenues, that commonly owned newspapers and television stations do not compete with each other, and that such commonly owned media in the same market will have power to control prices regardless of the other competition they face. In its Comments of May 13, 1974, PNS showed why real-world newspapers and television stations do not conform to this theoretical model, even if antitrust theory were controlling as to the public interest under the Communications Act.

To bolster its case, however, the Justice Department has exhumed an econometric study submitted to the Commission in 1970 ("the Owen study"),* which pur-

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*B. M. Owen, "Empirical Results on the Price Effects of Joint Ownership in the Mass Media" (1969), reprinted as Appendix I to J. N. Roose, B.M. Owen, and D. L. Grey, "Economic Issues in Joint Ownership of Newspaper and Television Media," Docket 18110, May 1970.

ported to show that commonly owned newspapers and television stations in the same market charge higher rates. While carefully avoiding endorsement of the methodology or specific conclusions of this study, the Justice Department suggests that the study provides empirical support for the Department's abstract propositions of antitrust theory. The purpose of these Reply Comments is simply to show that, independently of the academic debate over Owen's methodology and the statistical significance of his results, the Owen study does not provide any valid support for the Justice Department's theory of market power.

Television Rates

With respect to television advertising, the Owen study does no more than test the hypothesis that the advertising rates of newspaper-affiliated television stations will be higher than those of other stations. Its conclusion is that the hypothesis is correct on an overall, nationwide average. Assuming *arguendo* that the rates of stations commonly owned with newspapers are in fact higher than those of other comparable stations, it does not follow that it is the newspaper affiliation that causes the higher rates. That proposition could be established only if it were shown that there is no comparable correlation between higher rates and any other possible causes. The Owen study attempts to take account of the effect of the VHF channel assignments, network affiliation, and high income markets, but it does not take account of any other likley causal factors, including delivered audience – the most likely cause of all.

PNS starts from a different premise: Higher advertising rates in competitive markets reflect advertiser preferences. Advertisers will pay more, above all, for (1) the station in

the market which reaches the largest audience. In addition, advertisers tend to prefer (2) CBS affiliates, which typically have long been the strongest stations in particular markets and have long carried the largest number of programs with high audience recognition levels; (3) stations which were the first on the air in their market, and which tend therefore to have greater prestige and greater audience identification in the market than newer stations; and (4) low-band VHF stations, which provide a higher quality signal over a greater area and hence have greater audience potential than highband VHF stations.

PNS has tested these hypotheses in a simple non-econometric study of the stations with the highest published 30-second spot rates in the top 50 markets. The results are set forth in Appendix A. The study reveals strong correlations between each of the four characteristics tested and the highest advertising rates. (See Tables 2 and 3). Three-fourths of the highest-rate stations had more than one of the characteristics. Over half had three of the four! These correlations make clear that the higher advertising rates for newspaper-affiliated stations found by Owen on the basis of a national average cannot be accepted as persuasive evidence of any causal relationship between higher rates and newspaper cross-ownership.

The PNS study also shows that the correlations with characteristics related to advertiser preference are essentially the same among the highest rate stations commonly owned with newspapers as among other highest-rate stations. (See Table 3). Indeed, the characteristics of highest delivered audience, first-station status, and CBS affiliation are somewhat more common among the highest-rate newspaper-affiliated stations. Thus, the correlations found by the PNS study between the highest advertising rates and the factors which practical business-

men in the industry would expect to cause such rates obtain independently of newspaper cross-ownership and cannot be explained by such ownership. This result belies the Justice Department's contention that common ownership with a newspaper causes higher rates.

The PNS study has certain obvious limitations, and does not purport to be definitive.* As is recognized in the Owen study, the readily utilizable measures of comparable advertising rates for television stations are "far from perfect." (Owen study, p. 4) The rate PNS used – the highest published 30-second spot rate – avoids the complexities of rate cards and is likely to be more representative of a station's overall rates than the prime-time hour program rates used by Owen; but like Owen's measure in particular cases this rate may be atypical. Nonetheless, the limited PNS study is fully sufficient to establish the basic point that the Owen study in no way confirms the Department's theory.

In addition, it should be noted that neither the Owen study nor the PNS study addresses the question of the correct explanation for any correlation between cross-ownership and higher rates. One plausible explanation is that newspaper-owned stations were frequently the first station in their market. Another possibility is that newspaper-affiliated stations provide better quality service than other stations and therefore typically have larger audience shares. These possibilities are further illustrations of the essential irrelevance of the Owen study to the

*The study measures delivered audience by the ARB prime time share, since this rating is most compatible with the advertising rate measure used. The delivered audience ratings do not take account of demographic distribution. The study is limited to the top 50 markets, and does not take account of variations of the size of those markets or of the number of stations in each market.

Justice Department's theory that common ownership of a newspaper and a television station in the same market confers anti-competitive market power over prices.

Newspaper Rates

The Owen study also purports to show that newspapers under common ownership with television stations in the same market charge more for advertising than other newspapers. Like Owen's conclusion as to television rates, this showing does not establish a causal relationship, even assuming that its methodology is sound. But in the case of newspapers, the conclusion itself is advanced so gingerly, and can be so readily tested at least on a small scale, that it seemed appropriate to inquire into the validity of the study's results themselves. Indeed, Owen himself indicates that the hypothesis that newspapers under common ownership with televisions stations charge more than other papers is not a "strong" hypothesis, and the conclusion of his study is only that the results "can be interpreted as implying on average" a higher advertising rate for cross-owned newspapers. (Owen, study, pp. 8-9).

PNS undertook a simple study of newspaper advertising rates in major markets to see where there is in fact a correlation between common ownership with a television station and high rates. The study was limited to the top 20 markets by considerations of time and resources, but the results – set forth in Appendix B – are unequivocal. Not only is there no positive correlation between high newspaper advertising rates and television cross-ownership in those markets, but on the whole cross-owned newspapers had a markedly *lower* average rate than newspapers unrelated to television stations!

Specifically, the PNS study compared the lowest milline rates of the 50 metropolitan daily newspapers in the top 20 markets with circulation in excess of 100 thousand.* The milline rate, calculated by dividing the line rate by the net paid circulation and multiplying by one million.** is the rate most commonly used in the industry. This comparison revealed that the 26 cross-owned papers surveyed have an average milline rate of $4.51. The 24 papers without television cross-ownership have an average rate of $4.78. Thus, the separately owned stations as group charge about 6 percent *more* than cross-owned stations. The results are virtually the same if the eight stations in the top half of the rate range for the 50 papers – *i.e.*, stations with rates much higher than those of most papers – are eliminated. For the remaining 42 papers grouped in the bottom half of the range, the average milline rate is $4.33. The papers commonly owned with television stations are on the low side of the average, with an average of $4.23. The papers without such common ownership are on the high side of $4.45.

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*Where two or more different papers are published by the same company, or are published under a joint operating agreement, they are counted as separate papers.

**The study used the actual 5,000-line contract rates effective as of April, 1974, and the actual daily net-paid circulation (excluding Saturdays) as of September 30, 1973. The data source is the April 12, 1974 issue of "Newspaper Rates and Data," published by the Standard Rate and Data Service, Inc.

In the case of "all-day" papers, the data used was for the morning or evening edition having the lowest milline rate, since that rate is as accessible to the public as the higher rate edition. For the three such papers whose ad linage is sold only for all-day circulation, however, the combined morning and evening circulation was used in calculating the milline rate.

These results suffice to show that, at the most elementary level, the results of the Owen study cannot be relied on to buttress the Justice Department's abstractions.

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APPENDIX A

STUDY OF ADVERTISING RATES OF TELEVISION STATIONS IN THE TOP 50 MARKETS IN RELATION TO STATION CHARACTERISTICS LIKELY TO CAUSE ADVERTISERS TO PAY HIGHER ADVERTISING RATES

Table 1: Advertising Rates and Advertiser-Preference Characteristics of Television Stations in the Top 50 Markets – Complete Data.

Table 2: Advertiser Preference Characteristics of Stations in Top 50 Markets with Highest Advertising Rate in Market

Table 3: Prevalence of Advertiser-Preference Charactistics Among Stations in Top 50 Markets with Highest Advertising Rate in Market

TABLE 1

ADVERTISING RATES AND ADVERTISER-PREFERENCE CHARACTERISTICS OF TELEVISION STATIONS IN TOP 50 MARKETS[a] -- COMPLETE DATA

(* = station commonly owned with newspaper in the same market)

Market	Station[b]	Air-date	Affiliation	Channel	Highest[c] Published 30" Rate	Prime[d] Share of Homes (%)
New York	WABC	1949	ABC	7	$5800	25
	WCBS	1941	CBS	2	8000	31
	WNBC	1941	NBC	4	6000	28
	WNEW	1940	Ind	5	1500	9
	WOR	1949	Ind	9	1200	4
	*WPIX	1948	Ind	11	1225	2
Los Angeles	KABC	1949	ABC	7	3600	27
	KCOP	1948	Ind	13	600	2
	KHJ	1948	Ind	9	750	3
	KMEX	1962	Ind	34	150	1
	KNBC	1949	NBC	4	4300	29
	KNXT	1950	CBS	2	3750	29
	KTLA	1947	Ind	5	600	4
	KTTV	1949	Ind	11	600	6
Chicago	WBBM	1946	CBS	2	6000	31
	*WFLD	1966	Ind	32	390	2
	*WGN	1948	Ind	9	800	7
	WLS	1943	ABC	7	3500	28
	WMAQ	1948	NBC	5	3200	30
	WSNS	1970	Ind	44	150	1

a Based on ARB ADI TV HH Rank.
b Commercial stations only, excluding those not reportable in ARB.
c SRDS 5/15/74.
d Feb/March 1974 ARB, Mon-Sun 8-11PM NYCT.

TABLE I (continued)

ADVERTISING RATES AND ADVERTISER-PREFERENCE CHARACTERISTICS OF TELEVISION STATIONS IN TOP 50 MARKETS[a] -- COMPLETE DATA

(* = station commonly owned with newspaper in the same market)

Market	Station[b]	Air-date	Affiliation	Channel	Highest[c] Published 30" Rate	Prime[d] Share of Homes (%)
Philadelphia	KYW	1941	NBC	3	2000	27
	WCAU	1948	CBS	10	2100	32
	WKBS	1965	Ind	48	300	3
	WPHL	1965	Ind	17	250	4
	WPVI	1947	ABC	6	3000	31
	WTAF	1965	Ind	29	175	2
Boston	WBZ	1948	NBC	4	2000	25
	WCVB	1972	ABC	5	2700	28
	*WKBG	1966	Ind	56	300	3
	WNAC	1948	CBS	7	2400	31
	WSBK	1964	Ind	38	250	5
San Francisco	KHBK	1958	Ind	44	275	2
	KGO	1949	ABC	7	2500	27
	KPIX	1948	CBS	5	2000	30
	*KRON	1949	NBC	4	2500	28
	KTVU	1958	Ind	2	575	7
Detroit	CKLW	1954	Ind	9	$ 400	2
	WJBK	1948	CBS	2	1950	30
	WKBD	1965	Ind	50	250	6
	*WWJ	1947	NBC	4	2000	32
	WXYZ	1948	ABC	7	1600	30
Cleveland	*WEWS	1947	ABC	5	1600[e]	29
	WJW	1949	CBS	8	1500	33
	WKBF	1968	Ind	61	150	2
	WKYC	1948	NBC	3	1650	30

b Commercial stations only, excluding those not reportable in ARB.
c SRDS 5/15/74.
d Feb/March 1974 ARB, Mon-Sun 8-11PM NYCT.
e Specials, prime is $1350.

TABLE I (continued)

ADVERTISING RATES AND ADVERTISER-PREFERENCE CHARACTERISTICS OF TELEVISION STATIONS IN TOP 50 MARKETS[a] -- COMPLETE DATA

(* = station commonly owned with newspaper in the same market)

Market	Station[b]	Air-date	Affiliation	Channel	Highest[c] Published 30" Rate	Prime[d] Share of Homes (%)
Washington	WDCA	1966	Ind	20	225[f]	2
	*WMAL	1947	ABC	7	1500[g]	25
	WRC	1947	NBC	4	1500	25
	*WTOP	1949	CBS	9	2300	30
	WTTG	1947	INd	5	550	12
Pittsburgh	KDKA	1949	CBS	2	1200	39
	WIIC	1957	NBC	11	1200	20
	WTAE	1958	ABC	4	1000	27
Dallas/ Fort Worth	*KDFW	1949	CBS	4	1350	33
	KTVT	1955	Ind	11	220	8
	*WBAP	1948	NBC	5	1500	29
	*WFAA	1949	ABC	8	1760	28
St. Louis	KDNL	1969	Ind	30	200	3
	KMOX	1954	CBS	4	2160	39
	KPLR	1959	Ind	11	200	5
	*KTVI	1957	ABC	2	1100	24
	*KSD	1947	NBC	5	775	30
Minneapolis/ St. Paul	KMSP	1955	ABC	9	675	25
	KSTP	1948	NBC	5	700	29
	*WCCO	1949	CBS	4	750	33
	WTCN	1953	Ind	11	200	9
Houston	KHOU	1953	CBS	11	1000	32
	KHTV	1967	Ind	39	135	3
	*KPRC	1949	NBC	2	1100	33
	KTRK	1954	ABC	13	1000	30
	KVRL	1971	Ind	26	100	1

b Commercial stations only, excluding those not reportable in ARB.
c SRDS 5/15/74.
d Feb/March 1974 ARB, Mon-Sun 8-11PM NYCT.
f Children's programming, adult is $200.
g Estimating range for prime shows a high of $1850.

TABLE I (continued)

ADVERTISING RATES AND ADVERTISER-PREFERENCE CHARACTERISTICS OF TELEVISION STATIONS IN TOP 50 MARKETS[a] -- COMPLETE DATA

(* = station commonly owned with newspaper in the same market)

Market	Station[b]	Air-date	Affiliation	Channel	Highest[c] Published 30" Rate	Prime[d] Share of Homes (%)
Miami	WCIX	1967	Ind	6	400	3
	WCKT	1956	NBC	7	850	29
	WLTV	1967	Ind	23	100	5
	WPLG	1961	ABC	10	1200	24
	WTVJ	1949	CBS	4	1800	37
Atlanta	WAGA	1949	CBS	5	$1000	35
	*WSB	1948	NBC	2	457[h]	29
	WTCG	1967	Ind	17	250	5
	WXIA	1951	ABC	11	800	29
Seattle/ Tacoma	KING	1948	NBC	5	1100	36
	KIRO	1958	CBS	7	625	27
	KOMO	1953	ABC	4	1000	32
	KSTW	1953	Ind	11	170	2
	KTVW	1953	Ind	13	140	1
Indianapolis	WISH	1954	CBS	8	900	34
	WLW-I	1957	ABC	13	750	25
	WRTV	1949	NBC	6	750	27
	*WTTV	1949	Ind	4	200	8
Baltimore	*WBAL	1948	NBC	11	1100	29
	WBFF	1971	Ind	45	150	2
	WJZ	1948	ABC	13	1000	28
	*WMAR	1947	CBS	2	1100	34

b Commercial stations only, excluding those not reportable in ARB.
c SRDS 5/15/74.
d Feb/March 1974 ARB, Mon-Sun 8-11PM NYCT.
h Prime estimating range $485-600.

TABLE I (continued)

ADVERTISING RATES AND ADVERTISER-PREFERENCE CHARACTERISTICS OF TELEVISION STATIONS IN TOP 50 MARKETS[a] -- COMPLETE DATA

(* = station commonly owned with newspaper in the same market)

Market	Station[b]	Air-date	Affiliation	Channel	Highest[c] Published 30" Rate	Prime[d] Share of Homes (%)
Tampa/St. Petersburg	*WFLA	1955	NBC	8	550	35
	WLCY	1965	ABC	10	400	16
	WTOG	1969	Ind	44	120	3
	WTVT	1955	CBS	13	550	41
	WXLT	1971	Ind	40	63	2
Hartford/ New Haven	WFSB	1957	CBS	3	2045	36
	WHCT	1959	Ind	18	65	1
	WHNB	1953	NBC	30	420	16
	WTNH	1948	ABC	8	1000	23
Kansas City	KBMA	1970	Ind	41	130	4
	KCMO	1953	CBS	5	690	38
	KMBC	1953	ABC	9	750	28
	WDAF	1949	NBC	4	775	27
Cincinnati	*WCPO	1949	CBS	9	700	38
	WKRC	1949	ABC	12	700	25
	WLW-T	1948	NBC	5	700	28
	WXIX	1968	Ind	19	160	4
Milwaukee	WISN	1954	CBS	12	600	30
	WITI	1956	ABC	6	600	29
	*WTMJ	1947	NBC	4	650	31
	WVTV	1959	Ind	18	125	6
Sacramento/ Stockton	KCRA	1955	NBC	3	$1000	32
	*KOVR	1954	ABC	13	600	28
	KXTV	1955	CBS	10	245[i]	29
Portland, Ore.	KATU	1962	ABC	2	700	27
	KGW	1956	NBC	8	550	29
	*KOIN	1953	CBS	6	1000	33
	KPTV	1952	Ind	12	225	8

b Commercial stations only, excluding those not reportable in ARB.
c SRDS 5/15/74.
d Feb/March 1974 ARB, Mon-Sun 8-11PM NYCT.
i No prime rates published.

TABLE I (continued)

ADVERTISING RATES AND ADVERTISER-PREFERENCE CHARACTERISTICS OF TELEVISION STATIONS IN TOP 50 MARKETS[a] -- COMPLETE DATA

(* = station commonly owned with newspaper in the same market)

Market	Station[b]	Air-date	Affiliation	Channel	Highest[c] Published 30" Rate	Prime[d] Share of Homes (%)
Providence	WJAR	1949	NBC	10	550	25
	WPRI	1955	CBS	12	540	27
	WTEV	1963	ABC	6	500	24
Buffalo	*WBEN	1948	CBS	4	850	33
	WGR	1954	NBC	2	750	29
	WKBW	1958	ABC	7	825	29
	WUTV	1970	Ind	29	140	2
Denver	KBTV	1952	ABC	9	350	29
	MKGH	1953	CBS	7	590	29
	KOA	1953	NBC	4	550	31
	KWGN	1966	Ind	2	140	9
Nashville	WLAC	1954	CBS	5	450	36
	WNGE	1953	ABC	2	370	25
	WSM	1950	NBC	4	395	33
Columbus, O.	*WBNS	1949	CBS	10	500	40
	WLW-C	1949	NBC	4	400	29
	WTVN	1949	ABC	6	475	26
Memphis	*WMC	1948	NBC	5	350	31
	WREC	1956	CBS	3	370	35
	WHBQ	1953	ABC	13	270	25
San Diego	KCST	1965	ABC	39	165[i]	21
	KFMB	1949	CBS	8	650	32
	KGTV	1953	NBC	10	538	32
	XETV	1960	Ind	12	69	5

b Commercial stations only, excluding those not reportable in ARB.
c SRDS 5/15/74.
d Feb/March 1974 ARB, Mon-Sun 8-11PM NYCT.

TABLE I (continued)

ADVERTISING RATES AND ADVERTISER-PREFERENCE CHARACTERISTICS OF TELEVISION STATIONS IN TOP 50 MARKETS[a] -- COMPLETE DATA

(* = station commonly owned with newspaper in the same market)

Market	Station[b]	Air-date	Affiliation	Channel	Highest[c] Published 30" Rate	Prime[d] Share of Homes (%)
Charlotte	WBTV	1949	CBS	3	1000	42
	WCCB	1964	ABC	18	150	14
	WRET	1967	Ind	36	85	2
	WSOC	1957	NBC	9	440	29
New Orleans	WDSU	1948	NBC	6	450	33
	WGNO	1967	Ind	26	75	2
	WVUE	1959	ABC	8	550	24
	WWL	1957	CBS	4	525	41
Louisville	WAVE	1948	NBC	3	$ 375	33
	WDRB	1971	Ind	41	65	6
	*WHAS	1950	CBS	11	650	36
	WLKY	1961	ABC	32	350	18
Phoenix	KOOL	1953	CBS	10	400	35
	KPHO	1949	Ind	5	300	7
	KTAR	1953	NBC	12	500	26
	KTVK	1955	ABC	3	382	28
Grand Rapids/Kalamazoo						
	WKZO	1950	CBS	3	525	35
	WOTV	1951	NBC	8	400	30
	WUHQ	1971	ABC	41	100	6
	WZZM	1962	ABC	13	300	20
Oklahoma City	KOCO	1954	ABC	5	500	28
	KWTV	1953	CBS	9	435	33
	*WKY	1949	NBC	4	450	33
Greenville/Asheville/Spartanburg						
	*WFBC	1953	NBC	4	490	35
	WLOS	1954	ABC	13	300	25
	WSPA	1956	CBS	7	430	33

b Commercial stations only, excluding those not reportable in ARB.
c SRDS 5/15/74.
d Feb/March 1974 ARB, Mon-Sun 8-11PM NYCT.

TABLE I (continued)

ADVERTISING RATES AND ADVERTISER-PREFERENCE CHARACTERISTICS OF TELEVISION STATIONS IN TOPE 50 MARKETS[a] -- COMPLETE DATA

(* = station commonly owned with newspaper in the same market)

Market	Station[b]	Air-date	Affiliation	Channel	Highest[c] Published 30" Rate	Prime[d] Share of Homes (%)
Dayton	*WHIO	1949	CBS	7	725	41
	WKEF	1964	ABC	22	395	18
	WLW-D	1949	NBC	2	430	27
Albany/Schenectady/Troy						
	WAST	1956	ABC	13	400	23
	WRGB	1939	NBC	6	500	38
	WTEN	1953	CBS	10	400	37
Charleston/Huntington						
	WCHS	1954	CBS	8	300	30
	WHTN	1955	ABC	13	350	22
	WSAZ	1949	NBC	3	375	39
Wilkes Barre/Scranton						
	WBRE	1953	NBC	28	400	30
	WDAU	1953	CBS	22	400	30
	WNEP	1953	ABC	16	375	22
Harrisburg/Lancaster/York						
	*WGAL	1949	NBC	8	$ 395	33
	WHP	1953	CBS	21	185	15
	WLYH	1957	CBS	15	130	7
	WSBA	1952	CBS	43		5
	*WTPA	1953	ABC	27	225	17
Norfolk	WAVY	1957	NBC	10	390	27
	*WTAR	1950	CBS	3	470	42
	WVEC	1953	ABC	13	375	30
	WYAH	1961	Ind	27	100	1

b Commercial stations only, excluding those not reportable in ARB.
c SRDS 5/15/74.
d Feb/March 1974 ARB, Mon-Sun 8-11PM NYCT.

TABLE I (continued)

ADVERTISING RATES AND ADVERTISER-PREFERENCE CHARACTERISTICS OF TELEVISION STATIONS IN TOPE 50 MARKETS[a] -- COMPLETE DATA

(* = station commonly owned with newspaper in the same market)

Market	Station[b]	Air-date	Affiliation	Channel	Highest[c] Published 30" Rate	Prime[d] Share of Homes (%)
Orlando/Daytona Beach						
	WDBO	1954	CBS	6	500	36
	WESH	1956	NBC	2	330	35
	WFTV	1958	ABC	9	330	27
Birmingham	*WAPI	1949	NBC	13	325	33
	WBMG	1965	CBS	42	300	18
	WBRC	1949	ABC	6	500	42
Salt Lake City						
	KCPX	1948	ABC	4	450	38
	KSL	1949	CBS	5	250	31
	KUTV	1954	NBC	2	360	29
San Antonio						
	*KENS	1950	CBS	5	375	35
	KSAT	1957	ABC	12	410	30
	KWEX	1955	Ind	41	80	5
	WOAI	1949	NBC	4	370	27

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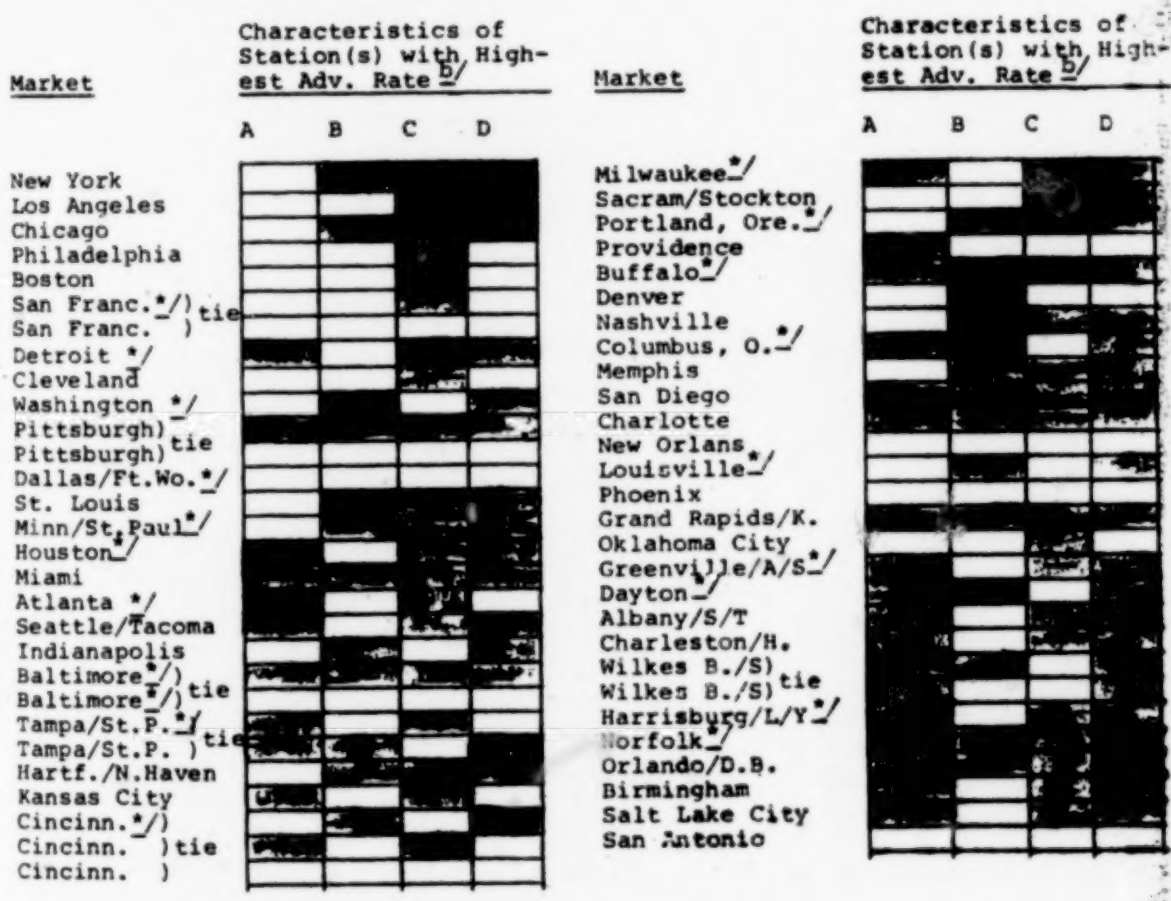
b Commercial stations only, excluding those not reportable in ARB.
c SRDS 5/15/74.
d Feb/March 1974 ARB, Mon-Sun 8-11PM NYCT.

Table 2

ADVERTISER-PREFERENCE CHARACTERISTICS OF STATIONS IN TOP 50 MARKETS [a] WITH HIGHEST ADVERTISING RATE IN MARKET

(* = station commonly owned with newspaper in the same market)

A = first station on air in market. B = CBS affiliate.
C = low band station or lowest channel in market. D = highest share of audience in market.



a Based on ARB ADI TV HH Rank.
b Based on Highest Published 30" Rate.

SOURCE: Table 1 (ties credited to both stations).

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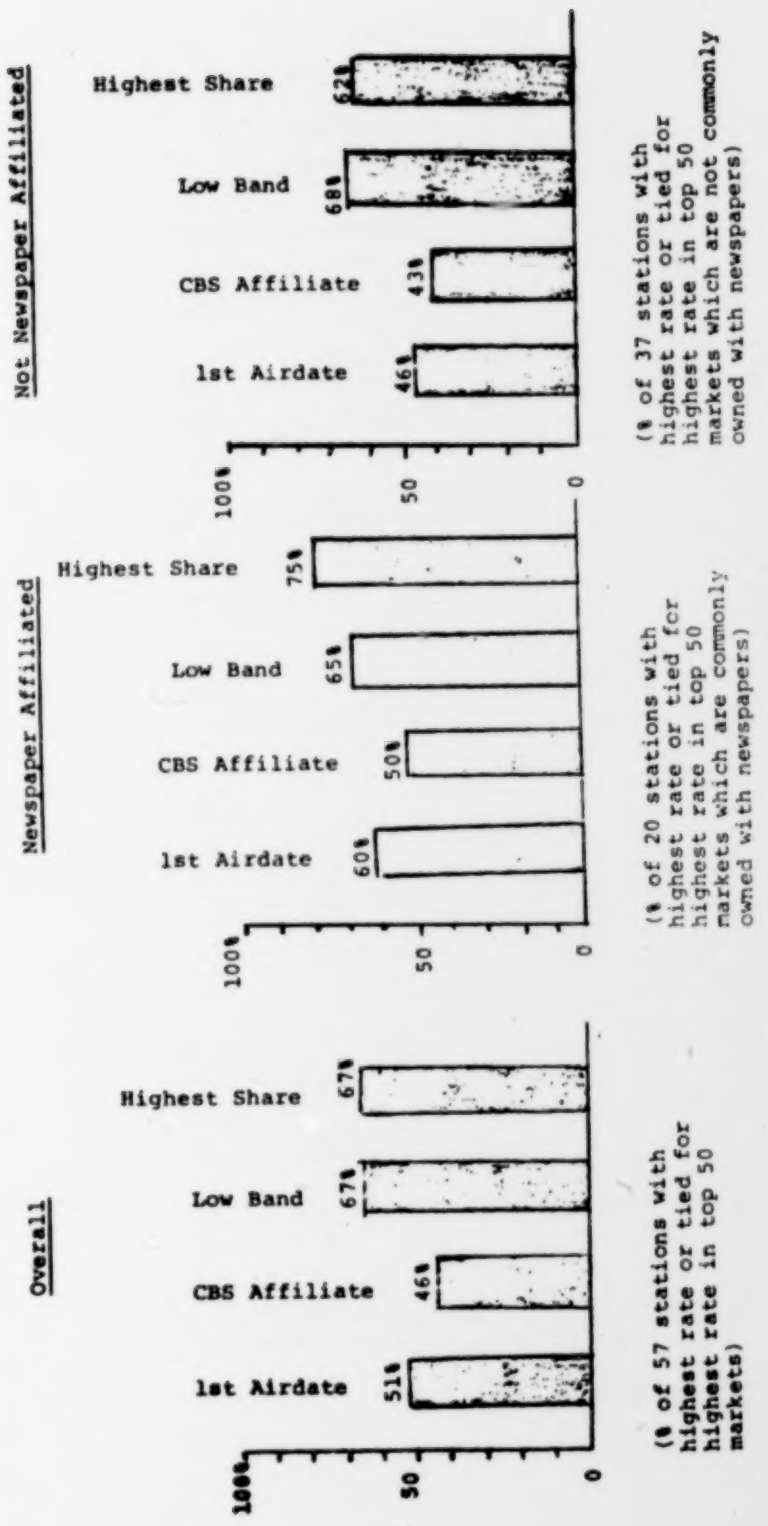
Table 3

PREVALENCE OF ADVERTISER-PREFERENCE CHARACTERISTICS AMONG STATIONS IN TOP 50 MARKETS WITH HIGHEST ADVERTISING RATE IN MARKET

(Source: Table 2)



APPENDIX B

STUDY OF ADVERTISING RATES OF METROPOLITAN DAILY NEWSPAPERS IN THE TOP 20 MARKETS IN RELATION TO COMMON OWNERSHIP WITH A TELEVISION STATION IN THE SAME MARKET

Table 4: Advertising Rates and Commonly Owned Television Stations for Metropolitan Daily Newspapers (Circulation 100,000 or more) in the Top 20 Markets

Table 5: Newspaper Advertising Rates and Television Cross-Ownership: Summary of Findings

TABLE 4

ADVERTISING RATES AND COMMONLY OWNED TELEVISION STATIONS OF METROPOLITAN DAILY NEWSPAPERS (CIRCULATION 100,000 OR MORE) IN THE TOP 20 MARKETS[a]

Newspaper (Ranked in Order of Milline Rate Starting with Lowest	City and Market Rank	Net Paid Daily Circ.	Daily 5,000 Line Rate	Milline Rate	Commonly Owned TV Station in Same Market
Times (M)	Los Angeles (2)	1,009,719	$2.68	$2.65	
News (M)	New York (1)	2,107,453	6.56	3.11	WPIX-TV
News (E)	Detroit (7)	682,142	2.27*	3.33	WWJ-TV
Plain Dealer (M)	Cleveland (8)	403,330	1.37	3.40	
Post (M)	Washington (9)	532,806	1.818	3.41	WTOP-TV
Press (E)	Cleveland (8)	373,917	1.33	3.56	WEWS-TV
Star (M)	Indianapolis (17)	231,118	.83	3.59	
Star Telegram (M&E)	Ft. Worth (11)	235,687	.87**	3.69	WBAP-TV
Free Press (M)	Detroit (7)	612,684	2.275	3.71	
Sun-Times (M)	Chicago (3)	567,617	2.16	3.81	WFLD-TV
Today (E)	Chicago (3)	425,089	1.62	3.81	WGN-TV

[a]As defined by ARB in terms of ADI's. For methodology and sources, see text of Comments, pp. 6-7.

*Flat-line applies to 5,000 lines.

**Ad linage sold only for both morning and evening editions.

M – Morning Paper.

E – Evening Paper.

TABLE 4 (continued)

ADVERTISING RATES AND COMMONLY OWNED TELEVISION STATIONS OF METROPOLITAN DAILY NEWSPAPERS (CIRCULATION 100,000 OR MORE) IN THE TOP 20 MARKETS[a]

Newspaper (Ranked in Order of Milline Rate Starting with Lowest	City and Market Rank	Net Paid Daily Circ.	Daily 5,000 Line Rate	Milline Rate	Commonly Owned TV Station in Same Market
News (E)	Chicago (3)	444,250	1.71	3.85	WFLD-TV
News (M)	Dallas (11)	266,667	1.03*	3.86	WFAA-TV
Star-News (E)	Washington (9)	408,193	1.61	3.94	WMAL-TV
Tribune (M)	Chicago (3)	681,759	2.70	3.96	WGN-TV
Herald (M)	Miami (18)	384,824	1.533	3.98	
Times-Herald (E)	Dallas (11)	243,524	.98*	4.02	KDFW-TV
Tribune (E)	Oakland (6)	186,745	.77*	4.12	
Star-Ledger (M)	Newark (1)	356,306	1.49	4.18	
Herald-Examiner (E)	Los Angeles (2)	452,885	1.96	4.33	
Chronicle (E)	Houston (14)	299,228	1.31	4.38	
Bulletin (E)	Philadelphia (4)	600,809	2.65	4.41	
Sun (M&E)	Baltimore (19)	384,739	1.70**	4.42	WMAR-TV
Post (M)	Houston (14)	293,595	1.31	4.46	KPRC-TV
Globe Democrat (M)	St. Louis (12)	284,110	1.27	4.47	KTVI-TV
Times (E)	Seattle (15)	236,866	1.086	4.58	
Times (M)	New York (1)	834,278	3.87	4.64	
News (E)	Indianapolis (17)	178,770	.83	4.64	
Journal (E)	Atlanta (16)	253,721	1.18*	4.65	WSB-TV

*Flat-line applies to 5,000 lines.

**Ad linage sold only for both morning and evening editions.

M – Morning Paper.

E – Evening Paper.

TABLE 4 (continued)

ADVERTISING RATES AND COMMONLY OWNED TELEVISION STATIONS OF METROPOLITAN DAILY NEWSPAPERS (CIRCULATION 100,000 OR MORE) IN THE TOP 20 MARKETS[a]

Newspaper (Ranked in Order of Milline Rate Starting with Lowest	City and Market Rank	Net Paid Daily Circ.	Daily 5,000 Line Rate	Milline Rate	Commonly Owned TV Station in Same Market
Globe (M&E)	Boston (5)	466,272	2.17*	4.65	WKG-TV
Post-Dispatch (E)	St. Louis (12)	298,515	1.44	4.82	KSD–TV
News (E)	Philadelphia (4)	262,391	1.29	4.92	
Herald-American (E)	Boston (5)	371,664	1.85	4.98	
Long Island Press (E)	New York (1)	355,046	1.77	4.99	WCOO-TV
Tribune (M)	Minneapolis (13)	233,025	1.18	5.06	WCCO-TV
Post-Intelligencer (M)	Seattle (15)	197,999	1.028	5.19	
Post (E)	New York (1)	626,713	3.30	5.27	
Constitution (M)	Atlanta (16)	213,212	1.13*	5.30	WSB-TV
Star (E)	Minneapolis (13)	253,491	1.36	5.37	WCCO-TV
Chronicle (M)	San Francisco (6)	468,091	2.54*	5.43	KRON-TV
Press (E)	Pittsburgh (10)	287,405	1.58	5.50	
Times (M)	St. Petersburg (20	172,439	.95*	5.51	
Inquirer (M)	Philadelphia (4)	454,741	2.52	5.54	
Post-Gazette (M)	Pittsburgh (10)	219,425	1.23	5.61	
Pioneer Press (M)	St. Paul (13)	107,963	.63	5.84	WCCO-TV
Tribune (M)	Tampa (20)	165,586	.98*	5.92	WFLA-TV
Newsday (E)	Garden City, NY (1)	444,407	2.75*	6.19	
News-American (E)	Baltimore (19)	217,423	1.35*	6.21	WBAL-TV
St. Paul Dispatch (E)	St. Paul (13)	126,147	.815	6.46	WCCO-TV
Examiner (E)	San Francisco (6)	180,019	1.515	8.42	

*Flat-line applies to 5,000 lines.
**Ad linage sold only for both morning and evening editions.
M – Morning Paper.
E – Evening Paper.

TABLE 5

NEWSPAPER ADVERTISING RATES AND TELEVISION CROSS-OWNERSHIP: SUMMARY OF FINDINGS

(Source: Table 4)

1. Of the 50 papers listed in Table 4, 26 are owned by companies or individuals that also own TV stations in the same metropolitan area (i.e., "cross-ownership papers").

2. The average milline rate of the cross-ownership papers ($4.51) is lower than the average for papers not involved in cross-ownership situations ($4.78). However, these averages are badly distorted by a significant skew in the distribution of papers within quartiles of the range ($2.65 – $8.42):

Quartile	Quartile Range	Total Papers	Cross-Ownership Papers
Lowest	$2.65-4.09	17	12
Second	4.10-5.53	25	10
Third	5.54-6.98	7	4
Upper	6.99-8.42	1	0

3. In the lower half of the range, one finds:

	Average Milline Rate
42 of 50 total papers	$4.33
22 of 26 cross-ownership papers	4.23
20 of 24 non-cross ownership	4.45

[FCC PUBLIC NOTICE 26054-B,
(July 15, 1975)]

HEARING CALENDAR (Commission *en banc)*

Docket No.	Applicant	Nature of Application

WEDNESDAY, JULY 24, 1974 (Oral Argument to be held before the Commission *en banc*. Room 856, 1919 M St. N.W., Washington, D.C.)
thru
FRIDAY, JULY 26, 1974

18110 Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations.

SCHEDULE OF APPEARANCES

Wednesday, July 24, 1974

Schedule	Party	Minutes Allotted
9:30 a.m.	U.S. Department of Justice	30
10:00	American Newspaper Publishers Association	60
11:00	Community Coalition for Media Change	20
11:20	Stauffer Publications, Inc.	10
11:30	Baer, Walter S.	20
11:50	Elyria-Lorain Broadcasting Co., Owensboro Broadcasting Co., and WEEU Broadcasting Company	20
12:10 p.m.	Citizens Communication Center (St. Louis Broadcast Coalition)	10
2:00	National Black Media Coalition	60
3:00	Post-Newsweek Station, Capital Area, Inc.	20
3:20	Houston Post Co. and Channel Two Television Co.	20

3:40	Center for Governmental Responsibility	20
4:00	Pulitzer Publishing Company, KSD, KSD-TV, Inc.	10
4:10	Evening News Association, Lee Enterprises, Inc. & WKY Television System, Inc.	20

Thursday, July 25, 1974

9:30 a.m.	National Association of Broadcasters	60
10:30	Barnett, Stephen R. (or his representative)	20
10:50	Cox Broadcasting Corporation	15
11:05	WGM Continental Broadcasting Co. & WPIX, Inc.	10
11:15	Newhouse Broadcasting Corporation	10
11:25	Alabama Civil Liberties Union	10
11:35	Donrey, Inc.	10
11:45	Center for Policy Research, Inc.	20
12:05 p.m.	Buffalo Evening News, Inc. and WBEN, Inc.	20
2:00	National Citizens Committee for Broadcasting	15
2:15	Dempsey & Koplovitz	15
2:30	Clift, Charles E.	15
2:45	Rocky Mountain Broadcasters Association	15
3:00	Duhamel Broadcasting Enterprises	10
3:10	Patrick, Wm. Lawrence	10
3:20	Effingham Broadcasting Company	10
3:30	KUTV, Inc.	10
3:40	WHAS, Inc.	20
4:00	Channel 7 Corporation	5

FRIDAY, JULY 26, 1974

9:30 a.m.	American Broadcasting Companies, Inc.	20
9:50	Americans for Democratic Action	15
10:05	Chronicle Publishing Co. and Chronicle Broadcasting Co.	10
10:15	Huntington Broadcaster, Inc.	10
10:25	Multimedia, Inc.	10
10:35	Post Company	10
10:45	Quincy Broadcasting Co. & Quincy Newspapers, Inc.	10

10:55	Radio Medford, Inc.	10
11:05	Labor Union News, Inc.	10
11:15	WTMJ, Inc.	20
11:35	Vindicator Printing Co. / WEMJ Broadcasting Co.	15
11:50	Walker, George R.	10
12:00 noon	Brockway Company	15
12:15	KSL, Incorporated	20

[Transcript of Oral Argument in Docket 18110, pp 130-148; 158-161; 179-181; 186-194; 380-385; 441-455 (July 1974)]

[130] THE CHAIRMAN: The National Citizens Committee for Broadcasting will be our final appearance for the morning session.

ARGUMENT ON BEHALF OF NATIONAL CITIZENS COMMITTEE FOR BROADCASTING

By

FRANK LLOYD

MR. LLOYD: Thank you very much.

As you stated, there has been a substitution and the St. Louis Broadcast Coalition will be appearing tomorrow at the time scheduled for the National Citizens Committee for Broadcasting.

I am Frank Lloyd, Director of the Citizens Community Center, appearing for NCCB.

NCCB has long opposed concentration of control in media; in fact, it, along with the Justice Department, was one of the first parties to propose including newspapers in this docket in response to the 1968 Notice. In fact, we resent the ANPA comment without Justice there would be no rule-making on this issue.

The Citizens group has been raising this issue in petitions to deny since 1969 and has been pressing for a resolution of this issue.

I don't want to go over grounds you have heard before. I will try to be very brief.

It seems to me that what you have heard this morning, really echoing Wally Baer on this, comes down to where

you [131] put the burden of proof in this proceeding.

The co-owners of broadcast and newspaper properties argue that they have put a heavy investment in and we need a clear showing of abuse and harm to require divestiture of one or the other.

The proponents of the rule of the Justice Department, ourselves, other citizens groups, argue that the FCC has a basic mandate for diversification media and that the broadcasters must show some clear benefit from the cross-ownership with newspapers to overcome this heavy burden of proof.

THE CHAIRMAN: Do you see any difference in that burden between prospective rules and divestiture?

MR. LLOYD: I see none. Clearly, it is easier once we get to the harm aspect, it seems to me that once you show that there are no countervailing benefits in terms of better programming by the cross-ownership or you can't prove beyond the shadow of a doubt that there are abuses in every one of these cases, should you carry out the basic mandate of diversification and what are the trade-offs.

COMMISSIONER HOOKS: You say that we have a mandate for diversification of media.

There has been some statement here this morning and in these voluminous filings that this Commission, as a matter of fact, encouraged newspapers to buy and operate television stations in the '50's.

[132] If we do have a mandate for diversification, under what time and circumstances does that mandate start? Did we have it before 1950 and just ignored it when we were advising, if that is indeed the fact?

MR. LLOYD: The First Amendment is an evolving standard.

I think that prior to the time that the Commission adopted its duopoly rules it may have encouraged the

same owner to own two stations in the same market because they were the only owners willing to buy those stations. They then adopted the duopoly rule and required divestiture.

COMMISSIONER HOOKS: In what time frame would you say the mandate for the diversification started with the adoption of the duopoly rules?

MR. LLOYD: The first time that the Commission began to look at this mandate to provide diversity as one that could be exercised through its economic deconcentration power as opposed to its programming power and that it might be better for the Commission to exercise this through its economic deconcentration authority.

COMMISSIONER HOOKS: I take it you don't think much of Mr. Fletcher's argument that he made in 1936 and repeats today that, constitutionally, we have no authority statutorily to prevent a newspaper publisher from owning a broadcast license.

MR. LLOYD: I do not.

[133] I think that the mandate that you have comes across clearly in your 1970 Notice where you said centralization of control over the media of mass communications is like monopolization of monopoly power, per se, undesirable.

Even the House Report on H.R. 12923, after talking about the deconcentration issue, said, "This is not to suggest in the slightest way that the Commission should be less vigilant in avoiding undue concentrations of control or less vigorous in effectively promoting diversification of broadcasting service."

It specifically stated these are worthy objectives that are the responsibility of the Commission.

So, you have ample statutory legislative history for this.

It seems to me to carry this out you have to look at how the two sides presented their burden.

We have raised in many petitions to deny in many individual cases abuses. In many cases, the Commission has not held these to be worthy of non-renewal but they have recognized that these show a potential for abuse in newspaper-TV cross-ownership.

In the KRON case, the Commission admitted that newsroom personnel were influenced by the relationship with the newspaper in reporting newspaper strikes, the Newspaper Preservation Act, cable franchising activity. The Commission went on [134] the narrow grounds that top management had not authorized this influence but the fact remains and the Commission recognizes that there was influence; there was a potential.

In Columbus, Ohio there was an influence on the TV listings. This has come up again and again in cases where you have the station running their own listings in bold face for their own TV and radio outlets.

THE CHAIRMAN: The argument that the broadcast and newspaper interests make is that abuses like that, that could be alleged to be an abuse, could be dealt with.

MR. LLOYD: But we have to deal with them, particularly in the programming area under an extrinsic evidence standard.

The Commission recognizes this is a difficult First Amendment area.

If you are getting into abuses, you are necessarily looking into programming questions.

THE CHAIRMAN: I meant listening.

MR. LLOYD: Yes; you could deal with that.

You could not deal with the newsroom basic conflict of interest. To get into that in an individual case, you have to hold a hearing, question news personnel.

The economic concentration approach, the approach this rule takes, is the least restrictive alternative. It is the way to get diversity with the least infringement on First Amendment rights.

[135] By going after abuses, you necessarily have to dig in and hold a hearing on what is happening in the newsroom.

I think the Commission should be taking the least restrictive First Amendment approach. The coverage of the media, itself, is perhaps the most critical place where you find this conflict of interest. In many communities, the media, itself, is the issue.

If they are co-owned, you can't get newspaper criticism of the television station. It was very hard to get coverage on co-owned TV stations in the Newspapers Preservation Act.

The St. Louis Journal did an article on that subject.

The point is not that we have made a clear and convincing case. We have shown a potential for harm. This is not an impeachment proceeding. This is not a prosecution, as ANPA seems to say, that they are being told that they were criminals and felons.

COMMISSIONER HOOKS: Likened to.

MR. LLOYD: Right.

We do not feel that the Commission needs a stronger case here than they needed for their duopoly rules, than they needed for their one-to-a-market rule. There was no conclusive proof that there would be worse programming if there would be two different owners of TV stations in the same town.

The Commission did not ask for conclusive studies and did very few studies at those times. It went on its basic [136] mandate.

I think that here again you should go on your basic mandate and the potential for abuse.

In the Wall Street Journal yesterday, we saw an article where a cross-owner said, "People around here just don't want to hear any other point of view."

Well, maybe that is true in that community but I don't believe the Commission should operate on that basic principle. They should operate on the principle there is a value in more diversity. If neither side meets the burden of clear evidence of better or worse performance, then deconcentration is mandated without showing there is some loss to the public.

We have had many arguments this morning. It seems to me that if the publishers argue that they will lose the economies of joint operation, then those economies must mean one of two things: Either they have joined their news staffs and joined their operations to the point that you have the adverse influence on diversity and even greater need for the rule, or that the same joint ownership is worth more in the stock market and that they are a more profitable enterprise because of their common ownership and they are saying the market places a value on monopoly power.

That is the very monopoly power we want to get rid of.

Basically, and I won't go through all the rest of the points that have been raised; I think they have been dealt [137] with; I think one of them has not been dealt with and that is the idea of instability, that they will be trading stations and new owners will come into the market rather than local. I think that sometimes a new face in a community is a valuable thing. In the first place, that new owner will have to conduct a new ascertainment of the community, will have to meet with community groups who may want to enter in a dialogue with him about how he is going to operate the station, may want to take fresh look at it.

I don't feel that it is necessarily bad for the Washington Post to be in Hartford or Jacksonville. They are a fresh face there. They are bringing a new viewpoint there. I think that can be very valuable for those communities.

There may be too much insulation. I think you have to balance localism with the concept of new faces.

My second major point, and I only have two, is this point that diversification is better carried out by a content neutral approach. Here is a chance for FCC to carry out its mandate in a way free of ideological taint. We don't care about the politics of the co-owner, the idea on the air. After that, we will let the free market and information and news function. This is the era of the Torinella case, of the NBC pensions case.

This is the time that many people are concerned with the FCC in the news room.

[138] This rule is designed to get the FCC out of the news room, out of looking for abuses, out of looking for individual allegations of abuses of this co-ownership relationship.

There is a market difference between the regulation of the economic structure of the communications industry which is designed to protect the basic minimum conditions in which free diversified speech may develop and regulations which attempt directly to assure such diversified speech by examining the speech, itself, to see if it meets the test of balanced fairness and diversity.

I feel if the public groups in this country are not to have the tools of the Fairness Doctrine to deal with counter commercials, not to have these weapons to get direct access to the medium, they have to have assurance of an unrigged marketplace, of one that will operate totally freely.

NCCB's proposal is before you. I will not go through it in detail. We argue for a flat ban on future acquisitions,

divestiture per se if over 30 per cent of the control of the audience in the market. If there is 20 to 30 per cent control, that is a prima facie test of concentration. Then you would look at a hearing into individual factors which will be specified by statute and you get out of the bind that the House Report says and we feel that the Commission does use shifting standards.

We would agree that it is difficult to know how you are [139] going to deal with the concentration case without listing of specific fact.

I think you have shown by the top 50 market policy how difficult it is to spell these out in a policy statement and not in a rule and using different criteria in each of the different cases under the top 50 market policies. We agree there should be some clarity in this area.

My final note I leave with you is, after hearing the argument this morning, I think even more strongly that the Commission needs an office of chief economist. The Commission now has economic divisions in each bureau which are subject to the normal bureau control, loyalty. That is very good, but you have an independent chief engineer; you have a general counsel, which can come to your meetings and advise you directly. I feel that the FCC needs its own high level of economist at these meetings to subject each case to independent analysis.

This could get away from the analysis of the input of the Justice Department. I feel the Justice Department is a very important party in this proceeding but the Commission should not be depending on studies from the Justice Department, studies from the industry, studies from citizens groups who don't have the resources. It should have the capacity to have its own studies and to arbitrate between these conflicting studies on the basis of its own firm factual [140] information.

THE CHAIRMAN: I might say that is one of the reasons why the Office of Plans and Policies has been established. I appreciate your comment in that regard.

Thank you.

We will start again at two o'clock.

(Whereupon, at 12:40 p.m., the oral argument hearing recessed, to reconvene at 2:00 p.m. of the same day.)

AFTERNOON SESSION

(2:00 p.m.)

[141] THE CHAIRMAN: We will begin now with the National Black Media Coalition.

MR. HAYES: Mr. Chairman, Jim Robinson will start off.

ARGUMENT ON BEHALF OF COLUMBUS BROADCAST COALITION By JAMES T. ROBINSON, JR.

MR. ROBINSON: Mr. Chairman, my name is Jim Robinson, with the National Black Media Coalition, and more specifically with the Columbus Broadcast Coalition of Columbus, Ohio.

I am here today representing the Columbus Broadcast Coalition of Columbus, Ohio. For years we have been concerned about the problems of print broadcast media cross-ownership and have been bringing those concerns to the attention of the Commission through formal pleadings for nearly five years.

May I just say here that the problems inherent in the

effort of a community group to petition an agency of the Government on issues of denial, exclusion and discrimination are truly monumental, especially when on the other side of those issues sit powerful and very wealthy media groups. The community group is automatically at a tremendous disadvantage and, further, is often totally dependent upon volunteer services from deeply concerned and committed [142] persons.

We have managed to sustain our thrust and concern for five years—primarily because the abuses of power that we continue to witness are so blatant, but even more because we believe our city and metropolitan area continue to have the potential to solve their problems. That in fact is the reason the Coalition was formed. Our hope has always been to develop the kind of cooperation between media groups and concerned citizens that would lead to problem solving as opposed to having the problematic facets of vital issues exascerbated by faulty media coverage and by one-sided, tunnel-vision in terms of information delivery. We contend and we believe we have evidence to prove such negative control over information delivery exists in the mid-Ohio (or rather metropolitan Columbus) area.

Actually, of the 19 broadcast outlets in Columbus, 15 are involved in cross and multiple ownership; of the four remaining stations three are limited audience FM radio stations, and one is an independent television station in the City of Columbus, but is part of a broadcast chain. Therefore, nearly 80 percent of the broadcast outlets are involved in cross-ownership arrangements.

But even more significant is the fact that the largest broadcast media group is cross-owned by an evening newspaper, which is the largest newspaper in the two-daily newspaper [143] market. Further complicating this picture is the fact that the other newspaper, the morning

newspaper, is printed by, has its advertising solicited by, and has its number of pages determined by the evening newspaper. Therefore the range of direct control, indirect control, and direct influence exercised by this one group over information delivery in the Columbus area includes the major television station, two of the major radio stations, the major newspaper and in a real sense the second newspaper in the market. It is only incidental, but nevertheless noteworthy, that this group's influence includes major banks, investment companies, real estate, and land development.

So great is this group's stake in the economic future of the Columbus area that its control over information delivery tends to be special interest oriented, as opposed to public interest oriented. Far too many of its positions, therefore, on issues of public policy are in its own interest and not that of the public. And though its broadcast activities are regulated by an agency of the stature of the Federal Communications Commission, there are no real limitations on its ability to use all of the market's significant print media for its own interests.

To what issues of public policy do I allude and are they the dominant and vital issues? I would maintain, on behalf of my group of concerned citizens, that surely the [144] issues of expanded voter registration, the rights of 18 year olds to vote, taxation, prison reform, criminal codes, partisan election issues, bonds and levies, discrimination in employment—both public and private, enforcement power of the Ohio Civil Rights Commission, developing awareness of Black citizens to their heritage and contributions to America, et cetera, are vital issues. This group's awesome power over the expression of unpopular positions and opinions—positions and opinions, I might add, that they themselves make unpopular by presenting only one side is well known. Its awesome power to pun-

ish those who differ with its views is intimidating and stifles in most citizens the desire to differ. This power, we assert, creates and maintains an uninformed electorate.

May I cite here my own personal experience: In September of 1970 I joined with other concerned Columbus citizens in filing petitions to deny against the heretofore mentioned media group's electronic media. I signed as an individual citizen but was publicized in bold type in a story about the issue in the media group's newspaper under my title and place of employment. No other petitioner was so listed in the story, even though others too held positions of significance. All were listed as they signed. This action damaged my career, and a promotion which I had been assured was subsequently denied. The explanation for the [145] denial was that I could no longer effectively deal with the media—a requirement of the new job. I ultimately received that promotion three years later. I believe this to be a perfect illustration of the misuse of the power of this media group. This is but one example.

Permit me to also cite a current example of the danger of this cross-ownership. For more than two years, an Ad Hoc Committee, authorized by the Mayor of the City of Columbus to study and advise on the employment policies of the City as they relate primarily to the uniformed services—the police and fire departments—has been taking a step-by-step approach to solving discrimination in this area. It is one of the most difficult issues facing urban communities of any size.

Columbus is very close to solutions in this area principally through the work of the Mayor's Ad Hoc Committee on Recruitment. But again the awesome power of this cross-owned media group has denied the Committee the ability to keep the rest of the community abreast of what

it has learned during the 24 months of study and deliberations. Only the disagreements and difficulties of the group have been publicized, not the agreements and the steps forward. Nor have the precedent setting decisions of courts in jurisdictions all around Columbus, which have a direct bearing on the local issues, been publicized. The dominant media

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[158] **ARGUMENT ON BEHALF OF ROCHESTER BLACK MEDIA COALITION**
By
MERRY LYNN KEY

MS. KEY: First, I would like to ask the Commission to bear with me. I have a slight case of laryngitis.

My name is Merry Key, and I am appearing before you as the representative of the Rochester, New York Black Media Coalition, an affiliate of NBMC.

Rochester could well be "Crossownership City, U.S.A." It is the home of the world's largest newspaper chain, the Gannett Newspapers. Gannett has for years owned WHEC-TV in Rochester, and until 1971 it also owned Rochester's second most powerful radio station, WHEC-AM. It also owns both the morning and evening newspapers in Rochester, and a major area cable TV system.

While it is not permitted to own much more than this in other media properties, its influence extends far beyond the newspapers, the TV station, and the cable system. The Chairman of the Board of Gannett, and the publisher of the Rochester papers, is also President of the Associated Press, the world's largest news service. The

General Manager of WHEC-TV is the brother of the news director at another Rochester TV station, WROC-TV. And the [159] top executives of the Gannett Company hold key positions in the Chamber of Commerce, the Boards of several banks and major corporations, and in the city sub-government.

Rochester provides several very specific examples of how newspaper-broadcast crossownership can lead to incredible abuses of power by monopolists. While the organizations in the Rochester Black Media Coalition have a petition to deny the license renewals of 14 Rochester stations, including Gannett-owned WHEC-TV, outstanding before you, and I am a party to that petition, I will not discuss it with you now. The petition dealt solely with issues of discrimination in employment and programming, not with crossownership. None of the problems I will discuss and relate to you is in any way at issue in the petition to deny.

However, the presence of crossownership involving WHEC-TV itself needs to be addressed, and we feel that this proceeding is the proper place, because it is likely that the visible results of crossownership abuses in Rochester are certain to exist in other crossownership cities as well, while perhaps not as visibly as in my home town.

The Rochester newspapers have a policy of not permitting newspeople to appear on competing television and radio stations. This policy is posted as a warning to newsroom employees, on the newsroom bulletin board. Gannett newsmen, however, regularly appear on the public affairs [160] programs of Gannett-owned WHEC-TV.

This policy works to the detriment of a locally-owned station, WOKR-TV, which has a public affairs program modelled after "Meet The Press" which deals with local

public issues. The only newsmen appearing represent radio stations or small suburban newspapers. Thus, the program's quality suffers, because Gannett Newspapers refuses to permit its 80-odd newsmen and women to appear. Since these newspeople represent nearly half of all the professional newspeople in Rochester, the effect of Gannett's prohibition on appearances on competing stations is to strengthen its own monopoly position unfairly. Gannett even publicly claims that any appearances of its newspeople on competing stations would tend to enhance the image of its competitors, not its own image, and that this somehow justifies restricting the public affairs capabilities of its competitors.

In at least one instance, a former newspaper employee told a member of our Coalition that she appeared at the WOKR-TV studio to do a guest appearance on a morning talk show. Just before airtime, the newspaper called her at the studio and advised her that if she appeared, she'd be promptly fired, because WOKR-TV competed with the newspaper-owned WHEC-TV. The show went on without her.

This is significant because it shows that when media monopolies exist, not only does the monopolist have no [161] incentive to provide superior service, his competitors also begin to have difficulty improving their service. When the FCC allows crossownership to exist, everybody suffers.

We have no great desire to applaud anything done by WOKR-TV. Our petition to deny applies to them as well, and while it does make one brave attempt at a public affairs program, it remains, in the opinion of many Black residents as reported in Rochester's alternative newspaper, the most racist station in Rochester in its employment and programming practices. However, this is no

reason for us to blind ourselves to the fact that even racists suffer from unfair competition.

In the summer of 1972, the Rochester Black Media Coalition held a mass meeting in the summer of 1972 in a neighborhood center. Almost 200 Black and Puerto Rican folks came and they were mad as hell about racism on TV. The newspaper's reporter was asked to leave, since we were planning strategy for a possible demonstration the next day. She immediately went to a TV station to appear live on the 11:00 p.m. news and complain that she was "put out of our meeting". Although three of Rochester's TV stations and 12 of its radio stations carry the news at 11:00, the station she just happened to choose to appear on was none other than WHEC-TV, which is owned by her newspapers. The newspapers and WHEC-TV gave no coverage of the primary point of the

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[179] **ARGUMENT ON BEHALF OF FACT, INC., NEW HAVEN, CONNECTICUT By JAMES ALEXANDER, EXECUTIVE DIRECTOR**

MR. ALEXANDER: Honorable Members of the Commission, Mr. Chairman, my name is James Alexander, and I am appearing before you as Executive Director of the Freedom Arts & Communications Team, FACT, Inc., of New Haven, Connecticut. FACT is the New Haven affiliate of the National Black Media Coalition. We conduct an ongoing training and community organization program designed to eliminate the effects of institutional racism from the mass media.

Divestiture in crossownership situations would perhaps lead to nothing better than one wealthy white broadcaster replacing another. In Les Brown's book Television: The Business Behind the Box, Mr. Brown reports that at the 1971 NAB Convention, multiple station owners were already working out deals to traffic in stations in order to comply with any divestitures resulting from Docket 18110.

Short of a rule that such divestitures be made in such a way that Black owners from the local community would have the first opportunity to buy into the stations put up for divestiture, this may be unavoidable.

THE CHAIRMAN: Is that something we can do under the Communications Act as you understand it?

MR. ALEXANDER: At this point I believe we will hold [180] this and let Mr. Hayes address himself to that.

THE CHAIRMAN: That is the question I addressed to Mr. Kweli earlier in fact.

MR. ALEXANDER: I hope the Commission takes steps to encourage monopoly owners to sell stations to local Black companies.

However, even if the only result of Docket 18110 is massive divestitures, this alone would provide an incentive to a score of new station operators to provide improved service to their communities.

My home State of Connecticut has seen innumerable transfers and sales of stations, the most notable of which was the CapCities transfer of the Triangle Publications stations in 1971. The CapCities station, WTNH-TV, negotiated an agreement, along with two other stations involved in the transfer, with Black citizen groups in New Haven, Philadelphia and Fresno. The agreement resulted in extensive minority documentary programming, employment opportunities, and the establishment of the first station advisory council in Connecticut. This in turn

led to the formation of advisory councils at WHNB-TV, and at WFSB-TV, the new Washington Post-owned station.

When the Post took over what is now WFSB-TV, it had to conduct an ascertainment of needs and make extensive efforts to become familiar with its service area. As a newcomer, it [181] was able to come into Connecticut without predetermined ideas about what the community needed. It is much easier for citizen groups to deal with the accountability of a newcomer than to deal with improving any incumbent.

Connecticut is also the home of one of the worst cross-ownership situations in the country. A single company in Stamford owns both newspapers, the only AM station and the only FM station. Allegations have been raised that this licensee discriminated against certain political candidates in allocating broadcast time.

Furthermore, Black citizens in Stamford have complained that the only Black-oriented program in its stations, Black Viewpoint, was removed from the air and replaced only after a competing application was filed for the station. Last month this Commission ordered a hearing on the issue of whether these practices constitute an abuse of power deriving from the existence of cross-ownership.

While this kind of classic, single-owner cross-ownership clearly results in abuses, newspaper-broadcast ownership even in the presence of competing stations can lead to serious problems as well. A major problem is the failure of cross-owned stations to seriously provide coverage of the local newspapers, and of the newspapers to provide coverage of the quality of local broadcasters. Cross-ownership provides a built-in conflict of interest in coverage of one of the most

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[186] THE CHAIRMAN: Next is the Post-Newsweek station, Capital Area, Incorporated. Ernest W. Gennes.

ARGUMENT ON BEHALF OF POST-NEWSWEEK STATION, CAPITAL AREA, INC.
By
ERNEST W. GENNES

MR. GENNES: Before the gentlemen from New Haven leave, I would like to tell them that I was pleased to hear about the wonderful job that the Post-Newsweek station is doing in Hartford. I can only assure them that it is doing an equally fine job in Washington, wholly independent of the Washington Post.

THE CHAIRMAN: If you will identify yourself for the record.

MR. GENNES: I am Ernest W. Gennes, counsel for Post-Newsweek station, Capital Area, Incorporated. If it please the Commission first let me address myself briefly to the so-called anti-trust point which for a substantial part of this proceeding has been the principle thrust of the case of the Anti-Trust Division.

The Anti-Trust Division has not provided this Commission with a single case showing that the facts and that the anti-trust laws require divestiture of newspaper affiliated television stations. If they had the cases they would not be here, they would be in court.

[187] Mr. Chairman, when Mr. Grossman turned off your question this morning with a joke I would have liked to have reminded him that the fact is that the Department of Justice did proceed against NBC in Philadelphia. Primary jurisdiction was argued in Philadelphia

and the Philadelphia court ordered divestiture of the Philadelphia station.

Now instead of being in court the Department of Justice is here arguing that there is an anti-trust policy beyond the anti-trust laws and beyond the decided cases which favors the largest possible number of separately owned competitors in every definable market and that this policy overrides all other public interest considerations.

But there is no such policy. The purpose of the anti-trust laws is to preserve vigorous economic competition, not to maximize the total number of competitors to the exclusion of all other considerations.

Moreover, the fact is that television commercials and newspaper advertisements, Commissioner Robinson, are not interchangeable products. There is not cross elasticity. It is true that cans and bottles are regarded as interchangeable but beer and Coca Cola are not. There are yachts racing up in New England in the 12 meter races now which are made of wood and are made of aluminum. But wood and aluminum are not interchangeable products. Neither is television advertising and newspaper advertising, although there is some [188] overlap.

Television stations and newspapers do not in the anti-trust sense compete for advertising in the same relevant market either in fact or under the court cases. Justice would have you adopt the policy that it is bad anti-trust policy as well as have you adopt bad anti-trust law.

Now another mistaken premise is that divestiture would foster diversity and news information and opinion. But diversity of expression and maximization of owners are not the same thing. That I believe is the fundamental error of the performance of divestiture. A television station is most likely to contribute significantly to the diversity of information and ideas if it is committed in principle to using a variety of sources of news and opinion, to providing generally informative news service, to doing original reporting, to doing investigative reporting without fear or favor, to encouraging debate by informed persons on political issues and to assuring its reporters and its commentators freedom to present news and opinion subject only to the constraints of responsible reporting.

This is not a matter of magnanimity as Mr. Grossman suggested. These attitudes are part of a tradition of a free press. They are part of the tradition of journalism as an honored profession and they are certainly at least as likely to be found in newspaper affiliated stations as in stations [189] owned by local business interests or owned by a group of special interests or by a local group so deliberately chosen to apparently reflect a community cross-section, that its news, its information, its editorials are forced into a blank neutrality for fear of offending anyone, or indeed by a non-local conglomerate rather with many business interests.

The mistaken premises of the Anti-Trust Division supporters lead inevitably to another basic error. That error is that this Commission should formulate a newspaper television station common ownership rule on the basis of presumption rather than on the basis of fact.

If there is one thing clear from this four year record it is that there is no evidence of competitive abuses or predatory commercial practices of the kind proscribed by the anti-trust laws, let alone illegal monopolies or other violations of the anti-trust laws arising out of cross-ownership. Absent such excesses, absent such abuses or violations, performance should control.

THE CHAIRMAN: When you say no monopolization, the second part of it, could we say based on a structure argument there could be in certain markets, perhaps in

every cross-owned market, some problem that we should be concerned about when we think about concentration of control of the mass media?

MR. GENNES: I don't think that there is on any theory [190] a monopoly or illegal monopoly in every cross-owned market. Indeed, I think there is intense competition.

THE CHAIRMAN: You acknowledge in some markets it is potentially there?

MR. GENNES: In some markets. I think the troublesome markets, Mr. Chairman, are the small markets. Indeed in the troublesome markets it is possible that the product choice is so limited that there is a fusion of the television market and the newspaper market so that perhaps there is a monopolization as to which this Commission should be concerned which would not exist in a larger market.

COMMISSIONER ROBINSON: You would not insist then that we would have to find an abuse before we take any action given other appropriate evidence of such concentration to warrant concern?

MR. GENNES: My position is this. Absent monopoly you have to find an abuse.

COMMISSIONER ROBINSON: You mean in a literal sense a monopoly?

MR. GENNES: In a literal sense. Well, absent what you can properly find a monopoly.

COMMISSIONER ROBINSON: If the Washington Post merged with the Washington Star we could not act without finding abuse?

MR. GENNES: Certainly not. If your question is if [191] there is one newspaper rather than two newspapers in Washington would this be a monopoly market requiring your attention, my answer would be no. The television broadcasting market consists of five commercial stations. There is an educational station, there are some 40 radio stations. This is a highly competitive market.

COMMISSIONER HOOKS: You differentiate at that level, you are going back to the argument that there is a generic difference between newspaper and television. You are saying if there is only one newspaper here that we could not find the monopoly with the ownership of the television station because television has to be compared with the other four television stations rather than the fact that it is co-owned by the one newspaper. Is that the basis of what you are saying?

MR. GENNES: I start from a different premise. My premise is that in fact television advertising and newspaper advertising are not competitive products. Accordingly in anti-trust terms they are not in the same roles at market. To the extent you are taking anti-trust policy into account you have no problem at all.

In response to Commissioner Robinson and to the Chairman I say yes, if you have a situation where there is one television station, one nywspaper, one radio, the fusion of the broadcast market, product market, and of the newspaper [192] market could exist so that products really are interchangeable. Accordingly television and newspaper become one market.

If both television and newspaper are owned by the same owner then you could well find you have a monopoly situation. I am not advocating that. I am saying you could find that.

THE CHAIRMAN: Mr. Gennes, when you say there could be separate product markets between newspaper and televisiqn in answer to Commissioner Hooks are you referring only to advertising now? What about news information?

MR. GENNES: At this point in the argument I am addressing myself to advertising because this was the starting point for the Department of Justice. It is hard to follow the Department of Justice's argument. I don't mean to be cute about it.

COMMISSIONER HOOKS: In dissemination of news two points are involved. One is advertising and the other is news. What I was trying to raise was whether or not you were considering that you could not bring up monopolization as an inherent thing if there were only one newspaper because you would be rating the four television stations as one species of profit and the newspaper another so far as advertising is concerned. I understand that.

When you go further, what about the dissemination of news?

[193] MR. GENNES: To the extent it is addressed to the market where there are a number of television stations, where there are a number of radio stations, if there is one newspaper I say it is a competitive market so far as mass communications is concerned and accordingly you don't have a monopolization. Accordingly you do have to find abuses.

COMMISSIONER ROBINSON: What would be an example of abuse that you would consider?

MR. GENNES: Forced buying, forced selling, joint advertising practices.

COMMISSIONER ROBINSON: Higher rates?

MR. GENNES: I will come to higher rates in a moment. I think that is a fallacy. But a conspiracy between a newspaper and joint action between a commonly owned newspaper and broadcast station to keep rates up. Of course this would be an abuse.

Of course this would be a proper basis for Commission action.

COMMISSIONER HOOKS: We could not deal with the one point that apparently could be important. You presented only one point of view because you conceal yourself behind the first Amendment. That goes back to the first statement you made in the beginning that the diversity of ownership is at least a promise of diversity of views and the dissemination of news, was consistent with the thing that the [194] National Black Media was talking about in presenting only one view except for the fairness doctrine.

From the viewpoints of anti-competitive practices we could never deal with that, am I right about that, absent fairness doctrine. The shield of the First Amendment would protect a monopolist as it related to presentation of one view.

MR. GENNES: The shield of the First Amendment would not relate to a number of the kind of things which were alleged in the last hour.

COMMISSIONER HOOKS: The diversity of ownership has some co-relation in the minds of some people with diversity of views, at least the possibility of more views which is a major concern of a lot of people.

MR. GENNES: That is correct. I suggest that ownership is less important for diversity than the way in which the station is run. You can have different owners and complete commonality of views and you can have common owners and you can have a broad spectrum of views being expressed.

COMMISSIONER HOOKS: You may not have given attention to this but if it were possible to deal with this whole question on a regulation of FCC where newspapers do cross-own television-radio facilities in the same locality that they must maintain an editorial staff and that type of thing would be within our regulatory philosophy so far as we are

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[380] We will now proceed—I understand that Dempsey & Koplovitz have withdrawn. So, our next participant will be the Citizens Communication Center, St. Louis Broadcasting Coalition, for ten minutes.

ARGUMENT ON BEHALF OF CITIZENS COMMUNICATION CENTER, ST. LOUIS BROADCAST COALITION
By
NANCY SCHMIDT

MS. SCHMIDT: I am not with Citizens Communication Center. I am Nancy Schmidt, the Chairperson of the St. Louis Broadcast Coalition.

THE CHAIRMAN: We will be pleased to receive your [381] presentation.

MS. SCHMIDT: The members of the Coalition are Action Against Apathy, a predominantly white suburban organization concerned with racism in the white community; the St. Louis Chapter of the United Farm Workers of America; Freedom of Residence, a local interracial organization which is devoted to improving the quality and quantity of local low-income and minority housing; Committee for Action thru Education, also interracial, which seeks to educate whites as to the nature, extent and effects of racism; the St. Louis and Missouri State Chapters of CORE, a black civil rights organization; Parishes Associated on the Kinloch Team, a church-sponsored interracial organization interested in improving living conditions in a black community in North St. Louis County; and ACTION, an interracial St. Louis based human rights organization.

These groups have been in existence from five to over 30 years. Their interest in the media stems from their recognition that the media has an immediate impact on

the problems of racism which they combat in every segment of St. Louis life. This interest has been sustained over a period of several years.

I believe that racism is a white problem, and that attitudinal and institutional changes must take place in the white community if the problem of racism is to be alleviated. [382] One of the primary influences of attitude is the media. With a greater diversity of ownership of the mass media, there is greater likelihood that minority views will reach whites as well as blacks.

The problem of cross-ownership is of particular importance to the St. Louis Broadcast Coalition. In St. Louis, one company, the Pulitzer Publishing Company, owns a newspaper, the Post-Dispatch, plus AM and TV stations, KSD-TV-AM. Another company, Newhouse owns our only other daily newspaper, the Globe-Democrat, and television station, KTVI. Together, these two companies control over 63 percent of all local advertising revenues in the St. Louis market, according to the Department of Justice.

Both Pulitzer and Newhouse have come before you in this proceeding attempting to justify continuation of their concentration of control of the mass media in St. Louis. Pulitzer, for example, argues for continuation of the present situation because (1) they were pioneers in the broadcasting industry, and they now depend on their local broadcast stations for financial security, (2) they have the capacity for innovations through shared profits deriving from cross-ownership, and (3) diversity in the market can be achieved by cable television.

These arguments, however, are invalid.

First, a broadcaster is not entitled to perpetual [383] ownership of a broadcast frequency simply because it was an early pioneer or because it uses its profits to subsidize its newspaper. This is antithetical to the Communications

Act of 1934 which clearly states that the airwaves belong to the public. Licenses are granted only so long as they serve the public interest, convenience and necessity. What a licensee did 52 years ago is irrelevant to whether it holds an undue concentration of control today.

Moreover, newspapers have already received substantial financial benefits by enactment of the Newspaper Preservation Act. Under this law, the two St. Louis daily newspapers have combined their resources, through a joint operating agreement. Thus they do not need subsidies from the broadcast stations—and certainly not from both radio and televison—in order to remain financially viable.

Second, Pulitzer has not supported its claim that cross-ownership allows for capability of underwriting developing but temporarily unprofitable innovations in either broadcast or print media by shared profits or losses. No examples of any such innovations are cited. In St. Louis we certainly do not see any costly innovations taking place in any of the broadcasting facilities co-owned with newspapers. When the Coalition approached these stations with innovative ideas and requests for more and improved public affairs programs, these suggestions were rejected as too costly.

[384] In fact, past performance statistics from the latest renewal applications negate Pulitzer's claim. The two newspaper-owned TV stations in St. Louis aired only ½ as much public affairs and "other" programming as the two non-newspaper owned stations.

Pulitzer, yesterday, also claimed that it innovated in employment of blacks. The fact is that, in analyzing the St. Louis station's Forms 395 the KSD stations are among the worst in St. Louis in terms of minority employment. This lack of aggressive affirmative action is also reflected in the employment policies of KSD's co-owned newspaper. Both KSD stations and the Post-

Dispatch share an Affirmative Action counselor, who at the beginning of this year indicated to the Coalition that he had not yet even written an affirmative action plan for KSD. Diversification of ownership would offer greater potential for commitment by a new owner to affirmative action in the hiring of minorities than has been shown by the present owners.

Finally, the claim that the trend toward growing cable television will eventually increase the number of mass media voices does not withstand close scrutiny. In St. Louis the franchise for cable television was obtained in 1969; construction is not scheduled to begin, however, until at least spring of 1975. With this type of delay, we question whether cable will ever reach St. Louis. We would also point out that the [385] city of St. Louis will have its own cable system, and each city in the suburbs will have their own. Thus, the audience reached via the access channels in any one cable system will be substantially less than that now reached by any of the present VHF stations.

In others words, most local issues affect the entire St. Louis area. Yet, they can only reach the entire area by access to, or ownership of, over-the-air broadcast stations. Individual access to channels on one of a hundred or so systems is simply ineffectual.

In conclusion, the Coalition urges that the FCC adopt a rule banning all cross-ownership of newspaper and television in a single market. This rule would apply to all future acquisitions, and should also include requirements for divestiture in presently existing cross-ownership cases.

Essential to divestiture is inclusion in the rule that preference to be given to minority ownership. In light of the small number of minority owned television stations, the FCC is in a unique position to correct past exclusion

of minorities from opportunities to purchase television stations. The Commission has been historically reticent to enforce affirmative action plans and or equal opportunities in employment by broadcasters; strong wording in the cross-ownership rule demanding that preference be given to minority ownership would demonstrate a commitment by the FCC for

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[440] Next we go to WHAS, Inc., for 20 minutes. We will take right after this WTMJ, Inc., for our final witness. We appreciate Mr. Ricks' and Mr. Cox's cooperation.

ARGUMENT ON BEHALF OF
WHAS, INC.
By
MARCUS COHN

MR. COHN: Thank you, Mr. Chairman.

Before beginning with the argument itself, I would like to introduce the three gentlemen who are sitting to my right. I represent Louisville newspapers and Radio and Television [441] Stations WHAS. To my immediate right is Wilson Wyatt, general counsel for the stations and the newspapers in Louisville. To his right, Ed Shadburne, who is vice president of WHAS. To my extreme right, Barry Bingham, Jr., editor and publisher of the newspapers as well as president of WHAS, Inc.

They will be available for any questions you wish to put to them directly concerning operations of the radio stations or newspapers.

Mr. Chairman, our basic position in this proceeding is that the FCC should adopt specific rules to prevent abuses that can but don't necessarily flow from cross-ownership.

All the rules which we propose are now in effect at WHAS and the newspapers. At the end of my argument I will mention five rules which we propose.

By way of introduction, I want to deal with he operations of the television, radio and newspapers. WHAS-AM began operation in 1922. WHAS-FM operated experimentally beginning in 1949 and then began on a regular license in 1966. It broadcast only classical music, and has a distinguished record of having lost a million dollars in the operation of the station. WHAS-TV began operation in 1950. There were two separate corporations with a newspaper and WHAS. The stockholders of the two corporations are basically similar.

Some basic facts concerning Louisville. Louisville is the 36th market in the United States. It has four commercial [442] television stations, two VHF and two UHF. The three networks are received in the community.

There is a 95 percent penetration of UHF in the market and therefore the UHF compete actively with the VHF. There is one unused UHF station, Channel 21, which is allocated but not licensed.

There are 11 AM stations in the area, that is Louisville and its suburbs. Six of them are full-time stations and five of them are daytime. In addition, there are six FM stations.

Out of the four television stations, two are owned locally and two are owned by non-residents. Nine out of the 17 radio stations, nine out of the 17, are owned by non-residents.

There are two daily newspapers in Louisville, the morning Louisville Courier-Journal and afternoon Louisville Times. These newspapers are not a part of a chain. They were begun by the Bingham family in 1918 and the Bingham family are all local residents of Louisville.

The stockholders of the newspapers and the stations have no mass media interest of any kind whatsoever outside of Louisville. I think this is unique for an institution of this size and this promise.

Moreover, it has consistently rejected all offers to acquire either radio or television or newspapers outside of Louisville. Those kinds of offers for the acquisition of those kinds of institutions come in almost daily.

[443] The reason for this is a basic philosophy in commitment that media should be related to their own local community by the owners themselves who live in that particular community, that local ownership is terribly important as a matter of public philosophy and public interest.

The Courier-Journal has received a great number of accolades during the years of its publication by the Binghams. In 1974 it was included in Time Magazine as one of the ten best newspapers in America. It was described, and I quote: "Although a press monopoly is never desirable, the Courier-Journal handles its responsibility well." Another quote: "Grandson Barry Bingham, Jr., 40, the current editor and publisher, has maintained the paper's public spirit tradition."

In 1974, also in a nationwide ranking by newspaper publishers of the ten best newspapers of America, the Louisville Courier-Journal was ranked as third out of all the daily newspapers in the United States.

Barry Bingham, Jr., editor and publisher of the papers, has received national acclaim as a distinguished publisher. In the July 15, 1974, issue of Time, only a couple of weeks ago, Time made a special edition—special section, I should say, devoted to "Leadership in America," and listed the 200 men in America who were the leaders under the age of 45 and upon whom this country could depend for the kind of leadership which this democratic society

needs in the years to come. Barry [444] Bingham was one out of the 13 from the media.

In other words, there were a total of 13 out of 200 that Time selected from the media, and Barry Bingham was one of the 13, as being one of the 200 of the leaders in America under 45.

I have distributed to you through the staff a lead story from the Wall Street Journal of July 11, 1974, which is devoted to the Louisville newspapers, Barry Bingham, and the basic philosophy and tradition relating to the integrity and the public service of those papers.

I would like to quote two paragraphs from this lead article of the Wall Street Journal of only a couple weeks ago:

"Clearly the 40-year-old Bingham is no ordinary publisher just as the papers his family has headed for three generations are no ordinary newspapers. To begin with, they are better than most. They have won a handful of Pulitzer Prizes and a slew of other national awards, and consistently show up in periodic surveys as the 'Top Ten Newspapers in America.'

"Moreover, the Bingham papers are the acknowledged 'Messrs. Clean' of the newspaper industry. This is no small distinction at a time when the ethics and credibility of the American press are undergoing their closest scrutiny in recent memory."

A word about the structure between the newspapers and [445] the broadcasting stations. The broadcasting stations are in a completely separate building from where the newspapers are published. The building was built in 1968, the current building, at a cost of about $4 million. The staffs of the newspapers and the radio stations and television station are completely separate. There is a complete operational divorcement between the newspapers and the broadcasting stations.

A word about the news gathering and reporting of the two institutions—newspapers on the one hand and broadcasting on the other:

Television has a staff of 129 individuals, of which 20 percent are in the news department. The AM station has 43 on its staff and five are in the news department. Twenty-three percent of the newspaper staff are in the news and editorial departments.

I want to point out to you that this is unique in the newspaper publishing field, that a percentage as high as 23 out of your total staff would be in news and editorials.

There is a reason for it, of course. The commitment of these two nationally-known newspapers to its community, to bringing to its community news in depth and all the news, not only in Louisville but the entire area that the paper serves—

COMMISSIONER REID: You are saying, I assume, that the newspapers have the same staff?

MR. COHN: They are separate staff between the two [446] newspapers. When I say 23 percent, I am lumping all the staffs together.

COMMISSIONER REID: Of the newspapers?

MR. COHN: Yes, ma'am.

There is presently and historically no relationship whatsoever between the rates which the newspapers charge and the rates which the broadcasting stations charge. Leaving aside the structure for a moment, I want to detail with some precision the operational policies of the newspapers and the broadcasting stations.

The news, editorial, and advertising personnel, as I indicated, of the newspapers on the one hand the stations on the other are completely separate. Moreover, and this is significant, and particularly, Commissioner Washburn, in light of your particular question, there is vigorous and

affirmative cross-criticism between the newspapers on the one hand and television and radio stations on the other, of the media.

On the broadcasting stations, the television and AM, those stations have carried for a long period of time the broadcast of an individual by the name of Bob Shulman. The broadcast related to a daily comment of his called "One Man's Opinion." It began in 1969.

I want to quote two or three things that Bob Shulman has said concerning the Louisville newspapers since 1969. Let me add hastily, when I asked for information concerning this [447] I received a stack about this high. I am only going to give you two or three illustrations of a stack of this high of the kind of criticism that took place.

The newspapers had urged editorially a peaceful but powerful demonstration of protest against President Nixon's Christmas Season bombing in Vietnam. Bob Shulman on television and radio said:

"This one man"—referring to Shulman—"can only regret and deplore the encouragement by the newspapers of a protest at the inaugural."

Point No. 2, there was criticism by Bob Shulman on television and radio of the manner in which the newspapers had given editorial support to local political candidates. Shulman said:

"It is a day of anemia that befell the Louisville newspapers for their ambivalence. It was a far cry from the tradition of the co-founder of these papers. The editorialists of today owe it to the people not only to be strong and firm in their endorsement but to brush up on an old saw that is a reporter's catechism: "accuracy, accuracy, accuracy."

Lastly, Bob Shulman said, by way of illustration, after the local newspapers had criticized some of the commercials on WHAS, Bob Shulman retorted that his ana-

lysis of the Louisville Courier-Journal indicated they were ads for losing-weight preparations, making the hair grow more lovely, and [448] promotions of all kinds of patent medicines. He referred to the newspaper critics of WHAS-TV as "dyspeptic newspaper critics."

Those are three of the kinds of illustrations of what goes on on the television and radio stations in terms of their treatment of the newspapers.

THE CHAIRMAN: Of course, the final story is that Shulman writes for the paper, doesn't he?

MR. COHN: He writes for the paper because the paper wanted a skilled professional ombudsman who would be a critic of all of the media, including the paper for which he writes, as well as all of the radio and television stations in the market. He has the experience to do it.

He also has on the television station a program known as "Viewpoint." "Viewpoint" is the public access to the use of the television station for the purpose of voicing the views and complaints of a community, and frequently—and this can all be documented—those voices of protest relate to WHAS as well as the newspapers, right there on the program entitled "Viewpoint."

Let me comment very briefly about some of the public service programming of WHAS-TV.

First of all, more than 20 percent of the programming of this television station, more than 20 percent, has consistently been devoted to news and public affairs. All you have to do [449] is look across the country at television stations and you will recognize the unique responsibility that is being discharged by this television station.

Its peer in the markets, the Advertising Club of Louisville, in a vote gave it 70 percent of the first places for news and community service programs. For 26 years the station has carried an event, a promotion, a local community affair called Crusade for Children, in which funds

are raised for physically and mentally handicapped individuals, children. Last year the station raised $800,000 in this one public service affair.

You undoubtedly have read of the station's investigative reporting entitled "Open City," in which it exposed the corruption and the crime in Louisville, a series of different programs which was ultimately awarded a First Award by the American Trial Lawyers Association.

Mr. Chairman, both the newspapers and the television station have full-time ombudsmen, individuals to whom you can go and complain about what either one of the institutions is doing, and get an affirmative response in terms of what your complaint is.

As far as the newspapers are concerned, you can complain about the fact that stories weren't carried correctly, references to you weren't correct, and this individual has an individual full-time responsibility to see that a correction [450] is made.

It was the first paper in America to have started a local ombudsman, and for three years it was the only newspaper to have it, although today a number do have it.

A reference was made in the course of proceedings yesterday to the National Commission on Violence Report in which someone indicated that report said in effect that newspapers had a responsibility to help solve society's problems.

Very interestingly, in that very report they recognized the greatness of the Louisville Courier-Journal in helping its community in terms of the social issues that this world is facing, particularly the society here in America is facing.

Mr. Chairman, if that light is correct, I gather I have four or five more minutes. I ask your indulgence for two or three more minutes after the red light goes on so that I can judge what I am doing here.

THE CHAIRMAN: All right. We could move along.

MR. COHN: I appreciate that.

In January of 1972, the newspapers also employed a full-time advertising ombudsman, which is the first time in America the newspaper did that. An advertising ombudsman is an individual to whom you can complain concerning any ad or any merchandise or any service that you get based upon an ad placed in the Lousiville Courier-Journal. It is his responsibility to follow up and it is his responsibility to correct [451] any injustice.

COMMISSIONER HOOKS: Let me ask you one question. Suppose that the Commission decided that the diversity of forces would require divestiture. Are you saying that because this is a case that may be outstanding and excellent above, let us say way above average, that we should not rule on the other cases because of this one case, or we should make an exception and grant a waiver?

I read your article, it came out in the Wall Street Journal, and I assume it is a very excellent operation.

Let us assume 80 of the 83 cases deal with the whole business of diversity of forces—

MR. COHN: I don't mean to be facetious, Mr. Commissioner, but if you are resolved to go ahead and issue such a rule, simply drop a footnote and say it does not apply to Louisville because of the superior quality of the newspapers and the stations. I don't mean that in a facetious way.

COMMISSIONER HOOKS: Could we do that in a rule making?

MR. COHN: I don't know how you do that in rulemaking, but it does demonstrate an across-the-board prohibition of cross-ownership would be a tremendous injustice to the citizens of Louisville.

A reply to the question which has come up again and again, the worst that could happen is that we would have to sell our television station to someone else. I suggest to you that [452] there is not the tradition, there is not the commitment, there is not the involvement, there is not the dedication of an outside purchaser coming into Louisville and buying this television station who would operate in the manner that the Bingham family has operated it.

THE CHAIRMAN: The question is often asked by some of the proponents of the rule: Could not the Bingham family bring that outstanding operation to Washington, D.C., and the Evening Star or Washington Post take their tradition to Louisville? What is the answer to that?

MR. COHN: The answer is that this family since 1918 has been based in Louisville. They are committed to Louisville. They have rejected all offers to buy any media anywhere outside of Louisville. This is a community station, in effect. This is a community newspaper, in effect.

COMMISSIONER HOOKS: Don't you think that is a little unfair?

MR. COHN: In what way?

COMMISSIONER HOOKS: Depriving all these citizens of this excellent operation.

Go ahead.

MR. COHN: Mr. Chairman, I would like to end by proposing to you the specific rules which we are recommending to you that you adopt. You have heard some of this kind of language stated generally, but our proposal is that the Commission [453] itself should adopt rules which set forth the following basic principles:

In any kind of cross-ownership situation, the rule would require that there be separate sales staffs and no combination advertising rates.

The rule would require that there be separate editorial and reportorial staffs.

The rule would require that there be no discrimination policies or rates to media competitors.

The rule would require that in cross-ownership licensing it will not be permitted unless the related newspaper also agrees as part of the licensing process to carry fair program listings, accept on a non-discriminatory basis advertising from all broadcasting stations, and the licensee and the newspaper agree that there will be no discriminatory policy against advertisers who use competitive media.

What we are actually suggesting to you is not leaving to the good intentions and good will—

COMMISSIONER HOOKS: On the last point, are you saying it should be addressed to the newspaper?

MR. COHN: It should be part of the rule, yes, sir.

COMMISSIONER HOOKS: Just on the legal proposition, in light of the case out of Miami where the Supreme Court knocked down this right to apply law, what legal basis would you have for saying to the Louisville Courier-Journal—

[454] MR. COHN: If you go back, Commissioner, and read the Kansas City Star case where the Department of Justice brought a criminal antitrust law suit against the Kansas City Star and its cross-owned television station and was successful in that criminal case, and the court of appeals sustained that conviction, and go back and read the Mansfield Journal case and Lorraine Journal case, there is no doubt in my mind that if one entity publishes the newspaper at the same time as the licensee, the Commission, because it is the licensee, can require the newspaper to do certain things. The newspaper does not have to be licensee. It can say, "We don't want to comply." That is fine. Just give up the license.

But as long as you are licensed and coming to this Commission and asking for the license, one of the conditions of getting the license is that you do adopt these particular kinds of practices.

THE CHAIRMAN: Could we control a radio station or television station that owns a bowling-alley, control the rates they pay their pin-setters?

MR. COHN: No, because that is unrelated to the problem that you are particularly concerned with.

THE CHAIRMAN: To the extent that suppose we are interested in fairness, we are interested in diversity of viewpoint, could we impose a Fairness Doctrine on a newspaper-television cross-ownership?

[455] MR. COHN: I don't think so.

THE CHAIRMAN: I think it might tend to follow. I might not support that, but it would follow.

COMMISSIONER HOOKS: You say you have to list the other stations fairly. It is a little bit of the Fairness Doctrine superimposed.

MR. COHN: Yes, but not an editorial Fairness Doctrine.

COMMISSIONER HOOKS: It is a little Fairness Doctrine.

MR. COHN: It is a commercial fairness practice doctrine I am talking about.

Mr. Chairman, there were a number of other things I wanted to deal with. I wonder whether or not I could have leave to file within the next three or four days a separate written statement and distribute it to the Commissioners which includes some of the points which I want to make which because of the shortness of time I was unable to do.

THE CHAIRMAN: You are free to file anything and the Commission can look at it and give it the weight it wants to as to informal comment. I can't guarantee that it will be considered before we make a decision.

MR. COHN: Mr. Chairman, thank you very much. We appreciate it.

THE CHAIRMAN: Thank you very much, Mr. Cohn.

[Rand Corporation Study, R-1585-MF, "Newspaper-Television Station Cross-Ownership: Options for Federal Action" (September 1974), Tables 7-10]

TABLE 7
JOINTLY OWNED DAILY NEWSPAPERS AND TELEVISION STATIONS IN THE SAME MARKET

NO.	STATE	CITY	AREA OF DOMINANT INFLUENCE	ADI RANK	NAME OF NEWSPAPER	TV CALL SIGN	NETWORK AFF.	VHF OR UHF	LOCAL OWNERSHIP[a]	GROUP OWNERSHIP NAME OF GROUP OWNER	NUMBER OF GROUP OWNED DAILIES	NUMBER OF GROUP OWNED TV
1	ALA	ANNISTON	ANNISTON	193	ANNISTON STAR	WHMA	CBS	V	YES	ANNISTON STAR	2	1
2	ALA	BIRMINGHAM	BIRMINGHAM	47	BIRMINGHAM NEWS	WAPI	NBC	V	NO	NEWHOUSE NEWSPAPERS	16	6
3	ARK	LITTLE ROCK	LITTLE ROCK	55	ARKANSAS DEMOCRAT	KTHV	CBS	V	YES			
4	CAL	FRESNO	FRESNO	73	FRESNO BEE	KMJ	NBC	U	NO	MCCLATCHY	3	2
5	CAL	SACRAMENTO	SACRAMENTO-STOCKTON	26	SACRAMENTO BEE	KOVR	ABC	V	YES	MCCLATCHY	3	2
6	CAL	SAN FRANCISCO	SAN FRANCISCO	6	SAN FRANCISCO CHRONICLE	KRON	NBC	V	YES			
7	COL	DENVER	DENVER	29	DENVER POST	KHBC[a]	IND	U	NO	NEWHOUSE NEWSPAPERS	16	6
8	DC	WASHINGTON	WASHINGTON	9	WASHINGTON STAR	WMAL	ABC	V	YES	WASHINGTON STAR	1	3
9	DC	WASHINGTON	WASHINGTON	9	WASHINGTONPOST	WTOP	CBS	V	YES	POST NEWSWEEK	1	3
10	FLA	TAMPA	TAMPA-ST PETERSBURG	20	TAMPA TRIBUNE & TIMES	WFLA	NBC	V	NO	MEDIA GENERAL	3	1
11	GA	ALBANY	ALBANY	148	ALBANY HERALD	WALB	NBC*	V	YES	GRAY COMMUNICATIONS	1	3
12	GA	ATLANTA	ATLANTA	17	ATLANTA JOURNAL & CONSTITUTION	WSB	NBC	V	YES	J.H. COX	6	5
13	IDA	IDAHO FALLS	IDAHO FALLS-POCATELLO	172	IDAHO FALLS POST REGISTER	KIFI	NBC*	V	YES			
14	ILL	CHAMPAIGN	SPRINGFIELD-DECATUR-CHAMPAIGN	74	CHAMPAIGN COURIER & NEWS GAZETTE	WCIA	CBS	V	NO	MIDWEST TELEVISION/ LINDSAY-SCHAUR	0 6	3 1
15	ILL	CHICAGO	CHICAGO	3	CHICAGO TRIBUNE & CHICAGO TODAY	WGN	IND	V	YES	TRIBUNE CORPORATION	6	4

16	ILL	CHICAGO	CHICAGO	3	CHICAGO DAILY NEWS & SUN TIMES	WFLD	IND	U	YES			
17	ILL	QUINCY	QUINCY-HANNIBAL	124	QUINCY HERALD-WHIG	WGEM	NBC	V	YES			
18	ILL	ROCK ISLAND	DAVENPORT-ROCK ISLAND-MOLINE	67	ROCK ISLAND ARGUS	WHBF	CBS	V	YES			
19	IND	BLOOMINGTON	INDIANAPOLIS	18	BLOOMINGTON-BEDFORD COURIER TRIBUNE	WTTV	IND	V	YES			
20	IND	ELKHART	SOUTH BEND-ELKHART	87	ELKHART TRUTH	WSJV	ABC	V	YES			
21	IND	SOUTH BEND	SOUTH BEND-ELKHART	87	SOUTH BEND TRIBUNE	WSBT	CBS	U	YES	SOUTH BEND NEWS	7	2
22	IND	TERRE HAUTE	TERRE HAUTE	113	TERRE HAUTE STAR & TRIBUNE	WTHI	CBS*	V	YES			
23	IOWA	CEDAR RAPIDS	CEDAR RAPIDS-WATERLOO	70	CEDAR RAPIDS GAZETTE	KCRG	ABC	V	YES			
24	IOWA	DES MOINES	DES MOINES	62	DES MOINES REGISTER & TRIBUNE	KRNT	CBS	V	YES	COWLES COMMUNICATION	5	3
25	IOWA	MASON CITY	ROCHESTER-MASON CITY-AUSTIN	130	MASON CITY GLOBE GAZETTE	KGLO	CBS	V	NO	LEE ENTERPRISES	14	4
26	KAN	TOPEKA	TOPEKA	129	TOPEKA STATE JOURNAL & CAPITAL	WIBW	CBS	V	YES	STAUFFER PUBLICATION	14	2
27	KY	LOUISVILLE	LOUISVILLE	36	LOUISVILLE COURIER JOURNAL & TIMES	WHAS	CBS	V	YES			
28	KY	PADUCAH	PADUCAH-HARRISBURG-CAPE GIRARDEAU	72	PADUCAH SUN DEMOCRAT	WPSD	NBC	V	YES			
29	LA	BATON ROUGE	BATON ROUGE	101	BATON ROUGE ADVOCATE & STATE TIMES	WBRZ	NBC	V	YES			
30	LA	SHREVEPORT	SHREVEPORT-TEXARKANA	58	SHREVEPORT JOURNAL	KSLA	CBS	V	YES			
31	ME	PORTLAND	PORTLAND-POLAND SPRING	75	PORTLAND PRESS HERALD EXPRESS & TELEGRAM	WGAN	CBS	V	YES	GUY GANNETT PUBLIC.	3	2
32	MD	BALTIMORE	BALTIMORE	19	BALTIMORE NEWS AMERICAN	WBAL	NBC	V	NO	HEARST CORPORATION	7	3
33	MD	BALTIMORE	BALTIMORE	19	BALTIMORE SUN	WMAR	CBS	V	YES	A.S. ABELL	1	2
34	MICH	DETROIT	DETROIT	7	DETROIT NEWS	WWJ	NBC	V	YES	EVENING NEWS	1	3
35	MINN	DULUTH	DULUTH-SUPERIOR	110	DULUTH NEWS TRIBUNE & HERALD	WDSM	NBC	V	NO	RIDDER PUBLICATIONS	13	2
36	MINN	MINNEAPOLIS-ST PAUL	MINNEAPOLIS-ST PAUL	13	MINNEAPOLIS STAR & TRIBUNE; ST PAUL PIONEER PRESS & DISPATCH	WCCO	CBS	V	YES	JOHN COWLES RIDDER PUBLICATIONS	1 13	2 2

37	MISS	COLUMBUS	COLUMBUS	165	COLUMBUS COMMERCIAL DISPATCH	WCBI	NBC**	V	YES			
38	MISS	JACKSON	JACKSON	80	JACKSON CLARION-LEDGER & NEWS	WJTV	NBC	V	YES			
39	MISS	MERIDIAN	MERIDIAN	162	MERIDIAN STAR	WTOK	CBS*	V	YES			
40	MO	JOPLIN	JOPLIN-PITTSBURG	118	JOPLIN GLOBE	KOAM	NBC	V	YES	PULITZER PUBLICATION	2	2
41	MO	ST LOUIS	ST LOUIS	12	ST LOUIS POST DISPATCH	KSD	NBC	V	YES	NEWHOUSE NEWSPAPERS	16	6
42	MO	ST LOUIS	ST LOUIS	12	ST LOUIS GLOBE DEMOCRAT	KTVI	ABC	V	NO			
43	MO	SPRINGFIELD	SPRINGFIELD	88	SPINGFIED LEADER,NEWS & PRESS	KYTV	NBC	V	YES			
44	NEB	HASTINGS	LINCOLN-HASTINGS KEARNY	81	HASTINGS TRIBUNE	KHAS	NBC	V	YES			
45	NEB	OMAHA	OMAHA	63	OMAHA WORLD HERALD	KETV	ABC	V	YES			
46	NEV	LAS VEGAS	LAS VEGAS	144	LAS VEGAS REVIEW-JOURNAL	KORK	NBC	V	NO	DONREY MEDIA	25	1
47	NY	BUFFALO	BUFFALO	27	BUFFALO NEWS	WBEN	CBS	V	YES			
48	NY	NEW YORK CITY	NEW YORK CITY	1	NEW YORK DAILY NEWS	WPIX	IND	V	NO	TRIBUNE CORPORATION	6	4
49	NY	ROCHESTER	ROCHESTER	59	ROCHESTER TIMES-UNION, DEMOCRAT & CHRONICLE	WHEC	CBS	V	YES	GANNET NEWSPAPERS	22	1
50	NY	SYRACUSE	SYRACUSE	68	SYRACUSE HERALD JOURNAL, HERALD AMERICAN &POST	WSYR	NBC	V	YES	NEWHOUSE NEWSPAPERS	16	6
51	NY	WATERTOWN	WATERTOWN-CARTHAGE	163	WATERTOWN TIMES	WWNY	NBC**	V	YES			
52	NC	GREENSBORO	GREENSBORO-HIGH POINT-WINSTON SALEM	52	GREENSBORO DAILY NEWS & RECORD	WFMY	CBS	V	NO	LANDMARK COMMUNIC.	3	2
53	NC	HICKORY	CHARLOTTE	34	HICKORY RECORD	WHKY	IND	V	YES			
54	ND	FARGO	FARGO	95	FARGO FORUM	WDAY	NBC	V	YES			
55	OHIO	AKRON	CLEVELAND	8	AKRON BEACON JOURNAL	WAKR	ABC	U	NO	KNIGHT NEWSPAPERS	8	1
56	OHIO	CINCINNATI	CINCINNATI	23	CINCINNATI POST & TIMES STAR	WCPO	CBS	V	YES	SCRIPPS-HOWARD	15	5
57	OHIO	CLEVELAND	CLEVELAND	8	CLEVELAND PRESS & NEWS	WEWS	ABC	V	NO	SCRIPPS-HOWARD	15	5
58	OHIO	COLUMBUS	COLUMBUS	32	COLUMBUS DISPATCH	WBNS	CBS	V	YES			
59	OHIO	DAYTON	DAYTON	41	DAYTON NEWS & JOURNAL HERALD	WHIO	CBS	V	NO	J.M. COX	6	5
60	OHIO	YOUNGSTOWN	YOUNGSTOWN	85	YOUNGSTOWN VINDICATOR	WFMJ	NBC	V	YES			
61	OKLA	OKLAHOMA CITY	OKLAHOMA CITY	39	OKLAHOMA CITY OKLAHOMAN & TIMES	WKY	NBC	V	YES			
62	OREG	PORTLAND	PORTLAND	25	PORTLAND OREGONIAN & OREGON JOURNAL	KOIN	CBS	V	NO	NEWHOUSE NEWSPAPERS	16	6
63	PA	ERIE	ERIE	131	ERIE NEWS & TIMES	WSEE	CBS	U	YES			

64	PA	HARRISBURG	HARRISBURG-YORK-LANCASTER-LEBANON	45	HARRISBURG PATRIOT & NEWS	WTPA	ABC	U	NO	NEWHOUSE NEWSPAPERS	16	6
65	PA	JOHNSTOWN	JOHNSTOWN-ALTOONA	71	JOHNSTOWN TRIBUNE-DEMOCRAT	WJAC	NBC	V	YES			
66	PA	LANCASTER	HARRISBURG-YORK-LANCASTER-LEBANON	45	LANCASTER INTELLIGENCER, JOURNAL, NEW ERA & NEWS	WGAL	NBC	V	YES	STEINMAN STATIONS	1	2
67	SC	GREENVILLE	GREENVILLE-SPARTANBURG-ASHEVILLE	38	GREENVILLE NEWS PIEDMONT	WFBC	NBC	V	YES	MULTIMEDIA NEWS	4	1
68	TENN	MEMPHIS	MEMPHIS	31	MEMPHIS COMMERCIAL APPEAL & PRESS SCIMITAR	WMC	NBC	V	NO	SCRIPPS-HOWARD	15	5
69	TEX	DALLAS	DALLAS-FT WORTH	11	DALLAS TIMES-HERALD	KDFW	CBS	V	NO	TIMES MIRROR	4	1
70	TEX	DALLAS	DALLAS-FT WORTH	11	DALLAS MORNING NEWS	WFAA	ABC	V	YES	A.H. BELO	7	2
71	TEX	HOUSTON	HOUSTON	14	HOUSTON POST	KPRC	NBC	V	YES			
72	TEX	TEMPLE	TEMPLE-WACO	108	TEMPLE TELEGRAM	KCEN	NBC	V	YES			
73	TEX	TEXARKANA	SHREVEPORT-TEXARKANA	58	TEXARKANA GAZETTE & NEWS	KTAL	NBC	V	YES			
74	UTAH	OGDEN	SALT LAKE CITY	50	OGDEN STANDARD	KUTV	NBC	V	NO	STANDARD CORPORATION	1	3
75	UTAH	SALT LAKE CITY	SALT LAKE CITY	50	SALT LAKE CITY DESERET NEWS	KSL	CBS	V	YES	BONNEVILLE INTRNTNL	1	2
76	VA	NORFOLK-PORTSMOUTH	NORFOLK-HAMPTON-PORTSMOUTH-NEWPORT NEWS	46	NORFOLK VIRGINIAN PILOT & LEDGER STAR	WTAR	CBS	V	YES	LANDMARK COMMUNIC	3	2
77	WASH	SPOKANE	SPOKANE	77	SPOKANE SPOKESMAN, REVIEW & CHRONICLE	KHQ	NBC	V	YES			
78	WVA	BLUEFIELD	BLUEFIELD-OAK HILL-BECKLEY	132	BLUEFIELD TELEGRAPH & SUNSET NEWS OBSERVER	WHIS	NBC	V	YES	DAILY TELEGRAPH	1	2
79	WISC	MILWAUKEE	MILWAUKEE	24	MILWAUKEE JOURNAL & SENTINEL	WTMJ	NBC	V	YES			
80	WISC	WAUSAU	WAUSAU-RHINELANDER	135	WAUSAU RECORD HERALD	WSAU	CBS	V	YES			

SOURCES: TELEVISION FACTBOOK,1973-1974 EDITION; BROADCASTING YEARBOOK,1973; EDITOR AND PUBLISHER,1973 YEARBOOK

NOTES: ~ THE DENVER POST HOLDS A CONSTRUCTION PERMIT FOR KHBC. THE STATION WAS NOT ON THE AIR DURING 1973.

& A GROUP OWNER IS CONSIDERED "LOCAL" IF HEADQUARTERED IN THE COMBINATION'S HOME CITY.

* AFFILIATED WITH ABC

** ALSO AFFILIATED WITH ABC AND CBS

TABLE 8
DAILY NEWSPAPER COMPETITION FACING NEWSPAPER-TELEVISION COMBINATIONS

NUMBER	STATE	CITY	AREA OF DOMINANT INFLUENCE	ADI RANK	NAME OF NEWSPAPER	TV CALL SIGN	DAILY NEWSPAPER COMPETITION: CITY COMPETITORS	CITY SHARE	COUNTY COMPETITORS	COUNTY SHARE	SMSA COMPETITORS	SMSA SHARE	ADI COMPETITORS	ADI SHARE
1	ALA	ANNISTON	ANNISTON	193	ANNISTON STAR	WHMA	0	100	0	100		NA[b]	0	100
2	ALA	BIRMINGHAM	BIRMINGHAM	47	BIRMINGHAM NEWS	WAPI	0	100	0	100	1	95	3	84
3	ARK	LITTLE ROCK	LITTLE ROCK	55	ARKANSAS DEMOCRAT	KTHV	1	41	1	41	1	42	4	32
4	CAL	FRESNO	FRESNO	73	FRESNO BEE	KMJ	0	100	0	100	0	100	5	67
5	CAL	SACRAMENTO	SACRAMENTO-STOCKTON	26	SACRAMENTO BEE	KOVR	1	62	1	62	3	60	12	36
6	CAL	SAN FRANCISCO	SAN FRANCISCO	6	SAN FRANCISCO CHRONICLE	KRON	0	100	0	100	15	50	21	40
7	COL	DENVER	DENVER	29	DENVER POST	KHBC~	1	53	1	53	4	50	12	45
8	DC	WASHINGTON	WASHINGTON	9	WASHINGTON STAR	WMAL	1	51	1	51	3	44	13	37
9	DC	WASHINGTON	WASHINGTON	9	WASHINGTONPOST	WTOP	1	49	1	49	3	51	13	44
10	FLA	TAMPA	TAMPA-ST PETERSBURG	20	TAMPA TRIBUNE & TIMES	WFLA	0	100	0	100	2	39	7	34
11	GA	ALBANY	ALBANY	148	ALBANY HERALD	WALB	0	100	0	100	0	100	1	80
12	GA	ATLANTA	ATLANTA	17	ATLANTA JOURNAL & CONSTITUTION	WSB	0	100	0	100	2	92	5	84
13	IDA	IDAHO FALLS	IDAHO FALLS-POCATELLO	172	IDAHO FALLS POST REGISTER	KIFI	0	100	0	100		NA	1	58
14	ILL	CHAMPAIGN	SPRINGFIELD-DECATUR-CHAMPAIGN	74	CHAMPAIGN COURIER & NEWS GAZETTE	WCIA	0	100[c]	0	100[c]	0	100[c]	8	25[c]
15	ILL	CHICAGO	CHICAGO	3	CHICAGO TRIBUNE & CHICAGO TODAY	WGN	2	49	11	50	17	47	31	42
16	ILL	CHICAGO	CHICAGO	3	CHICAGO DAILY NEWS & SUN TIMES	WFLD	2	50	11	47	17	42	31	37
17	ILL	QUINCY	QUINCY-HANNIBAL	124	QUINCY HERALD-WHIG	WGEM	0	100	0	100		NA	6	37
18	ILL	ROCK ISLAND	DAVENPORT-ROCK ISLAND-MOLINE	67	ROCK ISLAND ARGUS	WHBF	0	100	1	41	3	19	10	11
19	IND	BLOOMINGTON	INDIANAPOLIS	18	BLOOMINGTON-BEDFORD COURIER TRIBUNE	WTTV	1	d	1	d		NA	1	d
20	IND	ELKHART	SOUTH BEND-ELKHART	87	ELKHART TRUTH	WSJV	0	100	1	71	1	71	5	17
21	IND	SOUTH BEND	SOUTH BEND-ELKHART	87	SOUTH BEND TRIBUNE	WSBT	0	100	0	100	1	91	5	61
22	IND	TERRE HAUTE	TERRE HAUTE	113	TERRE HAUTE STAR & TRIBUNE	WTHI	0	100	0	100	0	100	7	51

23	IOWA	CEDAR RAPIDS	CEDAR RAPIDS-WATERLOO	70	CEDAR RAPIDS GAZETTE	KCRG	0	100	0	100	0	100	6	40
24	IOWA	DES MOINES	DES MOINES	62	DES MOINES REGISTER & TRIBUNE	KRNT	0	100	0	100	0	100	10	71
25	IOWA	MASON CITY	ROCHESTER-MASON CITY-AUSTIN	130	MASON CITY GLOBE GAZETTE	KGLO	0	100	0	100		NA	4	30
26	KAN	TOPEKA	TOPEKA	129	TOPEKA STATE JOURNAL & CAPITAL	WIBW	0	100	0	100	0	100	5	72
27	KY	LOUISVILLE	LOUISVILLE	36	LOUISVILLE COURIER JOURNAL & TIMES	WHAS	0	100	0	100	1	96	5	87
28	KY	PADUCAH	PADUCAH-HARRIS-BURG-CAPE GIRARDEAU	72	PADUCAH SUN DEMOCRAT	WPSD	0	100	0	100		NA	6	27
29	LA	BATON ROUGE	BATON ROUGE	101	BATON ROUGE ADVOCATE & STATE TIMES	WBRZ	0	100	0	100	0	100	1	96
30	LA	SHREVEPORT	SHREVEPORT-TEXARKANA	58	SHREVEPORT JOURNAL	KSLA	0	100	0	100	0	100	6	59
31	ME	PORTLAND	PORTLAND-POLAND SPRING	75	PORTLAND PRESS HERALD EXPRESS & TELEGRAM	WGAN	0	100	0	100	0	100	7	43
32	MD	BALTIMORE	BALTIMORE	19	BALTIMORE NEWS AMERICAN	WBAL	1	36	1	36	2	35	3	34
33	MD	BALTIMORE	BALTIMORE	19	BALTIMORE SUN	WMAR	1	64	1	64	2	62	3	61
34	MICH	DETROIT	DETROIT	7	DETROIT NEWS	WWJ	1	62	2	61	6	49	9	46
35	MINN	DULUTH	DULUTH-SUPERIOR	110	DULUTH NEWS TRIBUNE & HERALD	WDSM	0	100	2	73	3	65	5	62
36	MINN	MINNEAPOLIS-ST PAUL	MINNEAPOLIS-ST PAUL	13	MINNEAPOLIS STAR & TRIBUNE; ST PAUL PIONEER PRESS & DISPATCH	WCCO	0	100[c]	0	100[c,e]	0	100[c]	7	89[c]
37	MISS	COLUMBUS	COLUMBUS	165	COLUMBUS COMMERCIAL DISPATCH	WCRI	0	100	0	100		NA	0	100
38	MISS	JACKSON	JACKSON	80	JACKSON CLARION-LEDGER & NEWS	WJTV	0	100	0	100	0	100	2	80
39	MISS	MERIDIAN	MERIDIAN	162	MERIDIAN STAR	WTOK	0	100	0	100	0	100	0	100
40	MO	JOPLIN	JOPLIN-PITTSBURG	118	JOPLIN GLOBE	KOAM	0	100	1	76	1	81	9	36
41	MO	ST LOUIS	ST LOUIS	12	ST LOUIS POST DISPATCH	KSD	1	59	1	59	5	46	8	43
42	MO	ST LOUIS	ST LOUIS	12	ST LOUIS GLOBE DEMOCRAT	KTVI	1	41	1	41	5	38	8	37
43	MO	SPRINGFIELD	SPRINGFIELD	88	SPINGFIED LEADER,NEWS & PRESS	KYTV	0	100	0	100	0	100	2	90
44	NEB	HASTINGS	LINCOLN-HASTINGS KEARNY	81	HASTINGS TRIBUNE	KHAS	0	100	0	100		NA	7	12
45	NEB	OMAHA	OMAHA	63	OMAHA WORLD HERALD	KETV	0	100	0	100	1	89	6	77
46	NEV	LAS VEGAS	LAS VEGAS	144	LAS VEGAS REVIEW-JOURNAL	KORK	1	61	1	61	1	61	1	61
47	NY	BUFFALO	BUFFALO	27	BUFFALO NEWS	WBEN	1	70	1	71[e]	4	58	12	48
48	NY	NEW YORK CITY	NEW YORK CITY	1	NEW YORK DAILY NEWS	WPIX	2	34[e]	5	50[e]	15	44	42	32
49	NY	ROCHESTER	ROCHESTER	59	ROCHESTER TIMES-UNION, DEMOCRAT & CHRONICLE	WHFC	0	100	0	100	3	93	3	93
50	NY	SYRACUSE	SYRACUSE	68	SYRACUSE HERALD JOURNAL, HERALD AMERICAN &POST	WSYR	0	100	0	100	2	91	5	76
51	NY	WATERTOWN	WATERTOWN-CARTHAGE	163	WATERTOWN TIMES	WWNY	0	100	0	100		NA	1	87
52	NC	GREENSBORO	GREENSBORO-HIGH POINT-WINSTON SALEM	52	GREENSBORO DAILY NEWS & RECORD	WFMY	0	100	1	79	5	35	6	35
53	NC	HICKORY	CHARLOTTE	34	HICKORY RECORD	WHKY	0	100	0	100		NA	21	7
54	ND	FARGO	FARGO	95	FARGO FORUM	WDAY	0	100	0	100	0	100	4	51
55	OHIO	AKRON	CLEVELAND	8	AKRON BEACON JOURNAL	WAKR	0	100	0	100	1	87	24	13
56	OHIO	CINCINNATI	CINCINNATI	23	CINCINNATI POST & TIMES STAR	WCPO	1	52	1	52	1	55	6	45
57	OHIO	CLEVELAND	CLEVELAND	8	CLEVELAND PRESS & NEWS	WEWS	1	52	1	52	5	48	24	27
58	OHIO	COLUMBUS	COLUMBUS	32	COLUMBUS DISPATCH	WBNS	0	100	0	100	4	89	23	69
59	OHIO	DAYTON	DAYTON	41	DAYTON NEWS & JOURNAL HERALD	WHIO	0	100	0	100	3	87	10	63
60	OHIO	YOUNGSTOWN	YOUNGSTOWN	85	YOUNGSTOWN VINDICATOR	WFMJ	0	100	0	100	2	66	4	55
61	OKLA	OKLAHOMA CITY	OKLAHOMA CITY	39	OKLAHOMA CITY OKLAHOMAN & TIMES	WKY	1	79	1	79	3	74	13	62
62	OREG	PORTLAND	PORTLAND	25	PORTLAND OREGONIAN & OREGON JOURNAL	KOIN	0	100	0	100	1	89	8	65
63	PA	ERIE	ERIE	131	ERIE NEWS & TIMES	WSEE	0	100	0	100	0	100	3	68
64	PA	HARRISBURG	HARRISBURG-YORK-LANCASTER-LEBANON	45	HARRISBURG PATRIOT & NEWS	WTPA	0	100	0	100	1	89	9	32
65	PA	JOHNSTOWN	JOHNSTOWN-ALTOONA	71	JOHNSTOWN TRIBUNE-DEMOCRAT	WJAC	0	100	0	100	1	89	14	27
66	PA	LANCASTER	HARRISBURG-YORK-LANCASTER-LEBANON	45	LANCASTER INTELLIGENCER, JOURNAL, NEW ERA & NEWS	WGAL	0	100	1	96		NA	9	26
67	SC	GREENVILLE	GREENVILLE-SPARTANBURG-ASHEVILLE	38	GREENVILLE NEWS PIEDMONT	WFBC	0	100	0	100	1	67	6	37
68	TENN	MEMPHIS	MEMPHIS	31	MEMPHIS COMMERCIAL APPEAL & PRESS SCIMITAR	WMC	0	100	0	100	0	100	6	89
69	TEX	DALLAS	DALLAS-FT WORTH	11	DALLAS TIMES-HERALD	KDFW	1	52	5	47	12	30	20	26
70	TEX	DALLAS	DALLAS-FT WORTH	11	DALLAS MORNING NEWS	WFAA	1	48	5	43	12	28	20	26
71	TEX	HOUSTON	HOUSTON	14	HOUSTON POST	KPRC	1	48	3	45	4	45	7	43
72	TEX	TEMPLE	TEMPLE-WACO	108	TEMPLE TELEGRAM	KCEN	0	100	1	65	1	62	4	24

73	TEX	TEXARKANA	SHREVEPORT-TEXARKANA	58	TEXARKANA GAZETTE & NEWS	KTAL	0	100	0	100	0	100	6	15
74	UTAH	OGDEN	SALT LAKE CITY	50	OGDEN STANDARD	KUTV	0	100	0	100	1	23	6	17
75	UTAH	SALT LAKE CITY	SALT LAKE CITY	50	SALT LAKE CITY DESERET NEWS	KSL	0	100	0	100	1	77	6	68
76	VA	NORFOLK-PORTSMOUTH	NORFOLK-HAMPTON-PORTSMOUTH-NEWPORT NEWS	46	NORFOLK VIRGINIAN PILOT & LEDGER STAR	WTAR	0	100	0	100	0	100	3	67
77	WASH	SPOKANE	SPOKANE	77	SPOKANE SPOKESMAN, REVIEW & CHRONICLE	KHQ	0	100	0	100	0	100	6	74
78	WVA	BLUEFIELD	BLUEFIELD-OAK HILL-BECKLEY	132	BLUEFIELD TELEGRAPH & SUNSET NEWS OBSERVER	WHIS	0	100	0	100		NA	3	37
79	WISC	MILWAUKEE	MILWAUKEE	24	MILWAUKEE JOURNAL & SENTINEL	WTMJ	0	100	0	100	2	94	6	80
80	WISC	WAUSAU	WAUSAU-RHINELANDER	135	WAUSAU RECORD HERALD	WSAU	0	100	0	100		NA	5	33

SOURCES: TELEVISION FACTBOOK, 1973-1974 EDITION; CIRCULATION 73-74

NOTES:

[a] THE DENVER POST HOLDS A CONSTRUCTION PERMIT FOR KHBC. THE STATION WAS NOT ON THE AIR DURING 1973.

[b] NA IS ENTERED FOR THOSE CITIES NOT INCLUDED IN AN SMSA AS OF NOVEMBER 1, 1973.

[c] TWO NEWSPAPERS EACH OWN PART OF THE TELEVISION STATION. CONSEQUENTLY, THEIR NEWSPAPER CIRCULATION SHARES ARE COMBINED.

[d] CIRCULATION FIGURES NOT REPORTED.

[e] INCLUDES BOTH HENNEPIN (MINNEAPOLIS) AND RAMSEY (ST. PAUL) COUNTIES.

[f] "CITY" INCLUDES MANHATTAN ONLY. "COUNTY" INLUDES THE FIVE BOROUGHS OF NEW YORK.

TABLE 9
COMMERCIAL TELEVISION COMPETITION FACING NEWSPAPER-TELEVISION COMBINATIONS

NUMBER	STATE	CITY	AREA OF DOMINANT INFLUENCE	ADI RANK	NAME OF NEWSPAPER	TV CALL SIGN	COMMERCIAL TELEVISION COMPETITION [a,b] CITY TV OTHER TV UHF PRIME SHARE	COUNTY TV OTHER TV UHF PRIME SHARE	SMSA TV OTHER TV UHF PRIME SHARE	ADI TV OTHER TV UHF PRIME SHARE
1	ALA	ANNISTON	ANNISTON	193	ANNISTON STAR	WHMA	0 0 0 100	0 0 0 100	NA[c]	0 0 0 100
2	ALA	BIRMINGHAM	BIRMINGHAM	47	BIRMINGHAM NEWS	WAPI	2 1 1 32	2 1 1 32	2 1 1 32	2 1 1 29
3	ARK	LITTLE ROCK	LITTLE ROCK	55	ARKANSAS DEMOCRAT	KTHV	2 2 0 33	2 2 0 33	2 2 0 33	2 2 0 30
4	CAL	FRESNO	FRESNO	73	FRESNO BEE	KMJ	3 0 3 36	3 0 3 36	3 0 3 32	5 0 5 32
5	CAL	SACRAMENTO	SACRAMENTO-STOCKTON	26	SACRAMENTO BEE	KOVR	3 2 1 24	3 2 1 24	3 2 1 34	4 2 2 31
6	CAL	SAN FRANCISCO	SAN FRANCISCO	6	SAN FRANCISCO CHRONICLE	KRON	6 3 3 25	6 3 3 25	6 3 3 28	9 4 5 26
7	COL	DENVER	DENVER	29	DENVER POST	KHBC[a]	4 4 0	4 4 0	4 4 0	4 4 0
8	DC	WASHINGTON	WASHINGTON	9	WASHINGTON STAR	WMAL	4 3 1 26	4 3 1 26	4 3 1 33	5 3 2 31
9	DC	WASHINGTON	WASHINGTON	9	WASHINGTONPOST	WTOP	4 3 1 26	4 3 1 26	4 3 1 29	5 3 2 28
10	FLA	TAMPA	TAMPA-ST PETERSBURG	20	TAMPA TRIBUNE & TIMES	WFLA	4 2 2 36	4 2 2 36	4 2 2 36	5 2 3 37
11	GA	ALBANY	ALBANY	148	ALBANY HERALD	WALB	0 0 0 100	0 0 0 100	0 0 0 100	0 0 0 100
12	GA	ATLANTA	ATLANTA	17	ATLANTA JOURNAL & CONSTITUTION	WSB	4 2 2 37	4 2 2 37	4 2 2 33	4 2 2 31
13	IDA	IDAHO FALLS	IDAHO FALLS-POCATELLO	172	IDAHO FALLS POST REGISTER	KIFI	1 1 0 55	1 1 0 55	NA	1 1 0 45
14	ILL	CHAMPAIGN	SPRINGFIELD-DECATUR-CHAMPAIGN	74	CHAMPAIGN COURIER & NEWS GAZETTE	WCIA	1 0 1 66	1 0 1 66	1 0 1 68	3 0 3 40
15	ILL	CHICAGO	CHICAGO	3	CHICAGO TRIBUNE & CHICAGO TODAY	WGN	6 3 3 12	6 3 3 12	6 3 3 10	6 3 3 10
16	ILL	CHICAGO	CHICAGO	3	CHICAGO DAILY NEWS & SUN TIMES	WFLD	6 4 2 3	6 4 2 3	6 4 2 3	6 4 2 3
17	ILL	QUINCY	QUINCY-HANNIBAL	124	QUINCY HERALD-WHIG	WGEM	0 0 0 100	0 0 0 100	NA	1 1 0 45
18	ILL	ROCK ISLAND	DAVENPORT-ROCK ISLAND-MOLINE	67	ROCK ISLAND ARGUS	WHBF	0 0 0 100	0 0 0 100	2 2 0 38	2 2 0 37
19	IND	BLOOMINGTON	INDIANAPOLIS	18	BLOOMINGTON-BEDFORD COURIER TRIBUNE	WTTV	0 0 0 100	0 0 0 100	NA	4 3 1 10
20	IND	ELKHART	SOUTH BEND-ELKHART	87	ELKHART TRUTH	WSJV	0 0 0 100	0 0 0 100	0 0 0 100	2 0 2 31
21	IND	SOUTH BEND	SOUTH BEND-ELKHART	87	SOUTH BEND TRIBUNE	WSBT	1 0 1 55	1 0 1 55	1 0 1 57	2 0 2 35
22	IND	TERRE HAUTE	TERRE HAUTE	113	TERRE HAUTE STAR & TRIBUNE	WTHI	2 1 1 57	2 1 1 57	2 1 1 47	2 1 1 58

23	IOWA	CEDAR RAPIDS	CEDAR RAPIDS-WATERLOO	70	CEDAR RAPIDS GAZETTE	KCRG	2	2	0	37	2	2	0	37	2	2	0	33	3	3	1	25
24	IOWA	DES MOINES	DES MOINES	62	DES MOINES REGISTER & TRIBUNE	KRNT	2	2	0	41	2	2	0	41	2	2	0	39	3	2	1	32
25	IOWA	MASON CITY	ROCHESTER-MASON CITY-AUSTIN	130	MASON CITY GLOBE GAZETTE	KGLO	0	0	0	100	0	0	0	100				NA	2	2	0	36
26	KAN	TOPEKA	TOPEKA	129	TOPEKA STATE JOURNAL & CAPITAL	WIBW	1	0	1	67	1	0	1	67	1	0	1	70	1	0	1	76
27	KY	LOUISVILLE	LOUISVILLE	36	LOUISVILLE COURIER JOURNAL & TIMES	WHAS	3	1	2	33	3	1	2	33	3	1	2	35	3	1	2	36
28	KY	PADUCAH	PADUCAH-HARRIS-BURG-CAPE GIRARDEAU	72	PADUCAH SUN DEMOCRAT	WPSD	1	0	1	67	1	0	1	67				NA	3	2	1	35
29	LA	BATON ROUGE	BATON ROUGE	101	BATON ROUGE ADVOCATE & STATE TIMES	WBRZ	2	1	1	41	2	1	1	41	2	1	1	41	2	1	1	42
30	LA	SHREVEPORT	SHREVEPORT-TEXARKANA	58	SHREVEPORT JOURNAL	KSLA	1	1	0	55	1	1	0	55	1	1	0	40	2	2	0	39
31	ME	PORTLAND	PORTLAND-POLAND SPRING	75	PORTLAND PRESS HERALD EXPRESS & TELEGRAM	WGAN	2	1	0	50	2	2	0	39	2	2	0	51	3	2	1	33
32	MD	BALTIMORE	BALTIMORE	19	BALTIMORE NEWS AMERICAN	WBAL	3	2	1	30	3	2	1	30	3	2	1	29	3	2	1	32
33	MD	BALTIMORE	BALTIMORE	19	BALTIMORE SUN	WMAR	3	2	1	38	3	2	1	38	3	2	1	35	3	2	1	34
34	MICH	DETROIT	DETROIT	7	DETROIT NEWS	WWJ	4	2	2	34	4	2	2	34	5	3	2	29	5	3	2	29
35	MINN	DULUTH	DULUTH-SUPERIOR	110	DULUTH NEWS TRIBUNE & HERALD	WDSM	2	2	0	28	2	2	0	28	2	2	0	26	2	2	0	24
36	MINN	MINNEAPOLIS-ST PAUL	MINNEAPOLIS-ST PAUL	13	MINNEAPOLIS STAR & TRIBUNE; ST PAUL PIONEER PRESS & DISPATCH	WCCO	3	3	0	45	3	3	0	45	3	3	0	34	3	3	0	32
37	MISS	COLUMBUS	COLUMBUS	165	COLUMBUS COMMERCIAL DISPATCH	WCBI	0	0	0	100	0	0	0	100				NA	0	0	0	100
38	MISS	JACKSON	JACKSON	80	JACKSON CLARION-LEDGER & NEWS	WJTV	2	1	1	38	2	1	1	38	2	1	1	41	2	1	1	42
						WTOK	1	0	1	99	1	0	1	99				NA	1	0	1	100
39	MISS	MERIDIAN	MERIDIAN	162	MERIDIAN STAR	KOAM	2	1	1	32	2	1	1	32	2	1	1	34	2	1	1	41
40	MO	JOPLIN	JOPLIN-PITTSBURG	118	JOPLIN GLOBE	KSD	4	3	1	28	4	3	1	28	4	3	1	29	4	3	1	29
41	MO	ST LOUIS	ST LOUIS	12	ST LOUIS POST DISPATCH	KTVI	4	3	1	27	4	3	1	27	4	3	1	28	4	3	1	26
42	MO	ST LOUIS	ST LOUIS	12	ST LOUIS GLOBE DEMOCRAT																	
43	MO	SPRINGFIELD	SPRINGFIELD	88	SPINGFIED LEADER,NEWS & PRESS	KYTV	2	1	1	37	2	1	1	37	2	1	1	31	2	1	1	44
44	NEB	HASTINGS	LINCOLN-HASTINGS KEARNY	81	HASTINGS TRIBUNE	KHAS	0	0	0	100	0	0	0	100				NA	2	2	0	12
45	NEB	OMAHA	OMAHA	63	OMAHA WORLD HERALD	KETV	2	2	0	33	2	2	0	33	2	2	0	38	2	2	0	34
46	NEV	LAS VEGAS	LAS VEGAS	144	LAS VEGAS REVIEW-JOURNAL	KORK	2	2	0	37	3	3	0	35	3	3	0	30	3	3	0	30

47	NY	BUFFALO	BUFFALO	27	BUFFALO NEWS	WBEN	3	2	1	34	3	2	1	34	3	2	1	31	3	2	1	32
48	NY	NEW YORK CITY	NEW YORK CITY	1	NEW YORK DAILY NEWS	WPIX	6	5	1	4	6	5	1	5	6	5	1	5	7	6	2	4
49	NY	ROCHESTER	ROCHESTER	59	ROCHESTER TIMES-UNION, DEMOCRAT & CHRONICLE	WHEC	2	2	0	36	2	2	0	36	2	2	0	34	2	2	0	34
50	NY	SYRACUSE	SYRACUSE	68	SYRACUSE HERALD JOURNAL, HERALD AMERICAN &POST	WSYR	2	2	0	34	2	2	0	34	2	2	0	30	2	2	0	27
51	NY	WATERTOWN	WATERTOWN-CARTHAGE	163	WATERTOWN TIMES	WWNY	0	0	0	100	0	0	0	100				NA	0	0	0	100
52	NC	GREENSBORO	GREENSBORO-HIGH POINT-WINSTON SALEM	52	GREENSBORO DAILY NEWS & RECORD	WFMY	0	0	0	100	1	1	0	38	2	2	0	38	2	2	0	36
53	NC	HICKORY	CHARLOTTE	34	HICKORY RECORD	WHKY	0	0	0	9	0	0	0	9				NA	4	2	2	9
54	ND	FARGO	FARGO	95	FARGO FORUM	WDAY	1	1	0	53	1	1	0	53	1	1	0	55	2	2	0	24
55	OHIO	AKRON	CLEVELAND	8	AKRON BEACON JOURNAL	WAKR	0	0	0	100	0	0	0	100	0	0	0	100	5	3	2	1
56	OHIO	CINCINNATI	CINCINNATI	23	CINCINNATI POST & TIMES STAR	WCPO	3	2	1	36	3	2	1	36	3	2	1	38	3	2	1	37
57	OHIO	CLEVELAND	CLEVELAND	8	CLEVELAND PRESS & NEWS	WEWS	3	2	1	32	4	2	2	30	4	2	2	34	5	2	3	32
58	OHIO	COLUMBUS	COLUMBUS	32	COLUMBUS DISPATCH	WBNS	2	2	0	37	2	2	0	37	2	2	0	44	2	2	0	42
59	OHIO	DAYTON	DAYTON	41	DAYTON NEWS & JOURNAL HERALD	WHIO	2	1	1	44	2	1	1	44	2	1	1	44	2	1	1	46
60	OHIO	YOUNGSTOWN	YOUNGSTOWN	85	YOUNGSTOWN VINDICATOR	WFMJ	2	0	2	35	2	0	2	35	2	0	2	32	2	0	2	32
61	OKLA	OKLAHOMA CITY	OKLAHOMA CITY	39	OKLAHOMA CITY OKLAHOMAN & TIMES	WKY	2	2	0	37	2	2	0	37	2	2	0	31	3	3	0	31
62	OREG	PORTLAND	PORTLAND	25	PORTLAND OREGONIAN & OREGON JOURNAL	KOIN	3	3	0	31	3	3	0	31	3	3	0	33	4	4	0	33
63	PA	ERIE	ERIE	131	ERIE NEWS & TIMES	WSEE	2	1	1	32	2	1	1	32	2	1	1	33	2	1	1	28
64	PA	HARRISBURG	HARRISBURG-YORK-LANCASTER-LEBANON	45	HARRISBURG PATRIOT & NEWS	WTPA	1	1	0	49	1	1	0	49	1	1	0	54	4	1	3	26
65	PA	JOHNSTOWN	JOHNSTOWN-ALTOONA	71	JOHNSTOWN TRIBUNE-DEMOCRAT	WJAC	1	0	1	82	1	0	1	82	1	0	1	86	2	1	1	44
66	PA	LANCASTER	HARRISBURG-YORK-LANCASTER-LEBANON	45	LANCASTER INTELLIGENCER, JOURNAL, NEW ERA & NEWS	WGAL	1	0	1	77	1	0	1	77	1	0	1	83	4	0	4	41
67	SC	GREENVILLE	GREENVILLE-SPARTANBURG-ASHEVILLE	38	GREENVILLE NEWS PIEDMONT	WFBC	1	0	1	41	1	0	1	41	2	1	1	34	5	2	3	32
68	TENN	MEMPHIS	MEMPHIS	31	MEMPHIS COMMERCIAL APPEAL & PRESS SCIMITAR	WMC	2	2	0	32	2	2	0	32	2	2	0	29	2	2	0	29
69	TEX	DALLAS	DALLAS-FT WORTH	11	DALLAS TIMES-HERALD	KDFW	5	1	2	43	3	1	2	43	5	3	2	31	5	3	2	31
70	TEX	DALLAS	DALLAS-FT WORTH	11	DALLAS MORNING NEWS	WFAA	5	1	2	51	3	1	2	51	5	3	2	35	5	3	2	33

71	TEX	HOUSTON	HOUSTON	14	HOUSTON POST	KPRC	4	2	2	33	4	2	2	33	4	2	2	29	4	2	2	28
72	TEX	TEMPLE	TEMPLE-WACO	108	TEMPLE TELEGRAM	KCEN	0	0	0	100	0	0	0	100	0	0	0	100	1	1	0	40
73	TEX	TEXARKANA	SHREVEPORT-TEXARKANA	58	TEXARKANA GAZETTE & NEWS	KTAL	0	0	0	100	0	0	0	100	0	0	0	100	2	2	0	23
74	UTAH	OGDEN	SALT LAKE CITY	50	OGDEN STANDARD	KUTV	2	2	0	30	2	2	0	30	2	2	0	23	2	2	0	23
75	UTAH	SALT LAKE CITY	SALT LAKE CITY	50	SALT LAKE CITY DESERET NEWS	KSL	2	2	0	32	2	2	0	32	2	2	0	35	2	2	0	34
76	VA	NORFOLK-PORTSMOUTH	NORFOLK-HAMPTON-PORTSMOUTH-NEWPORT NEWS	46	NORFOLK VIRGINIAN PILOT & LEDGER STAR	WTAR	0	0	0	100	2	1	1	54	2	1	1	42	3	2	1	42
77	WASH	SPOKANE	SPOKANE	77	SPOKANE SPOKESMAN, REVIEW & CHRONICLE	KHQ	2	2	0	36	2	2	0	36	2	2	0	33	2	2	0	28
78	WVA	BLUEFIELD	BLUEFIELD-OAK HILL-BECKLEY	132	BLUEFIELD TELEGRAPH & SUNSET NEWS OBSERVER	WHIS	0	0	0	100	0	0	0	100				NA	1	1	0	60
79	WISC	MILWAUKEE	MILWAUKEE	24	MILWAUKEE JOURNAL & SENTINEL	WTMJ	3	2	1	32	3	2	1	32	3	2	1	31	3	2	1	30
80	WISC	WAUSAU	WAUSAU-RHINELANDER	135	WAUSAU RECORD HERALD	WSAU	1	1	0	59	1	1	0	59				NA	2	2	0	55

SOURCES: TELEVISION FACTBOOK,1973-1974 EDITION; ARBITRON SHARE OF HOURS STUDY: 1973 COUNTY REPORTS; ARBITRON TELEVISION DAY-PART AUDIENCE SUMMARY, NOVEMBER 1973; RAND-MCNALLY 1974 COMMERCIAL ATLAS AND MARKETING GUIDE.

978

NOTES:

[a] EDUCATIONAL TELEVISION STATIONS ARE NOT INCLUDED IN THE COUNTS OF COMPETING TELEVISION STATIONS, NOR ARE THEIR AUDIENCES CONSIDERED IN MEASURING THE PRIME TIME SHARES OF CROSSOWNED STATIONS. SATELLITES OF COMPETING STATIONS ARE ALSO EXCLUDED FROM THE COUNTS OF COMPETING STATIONS. SATELLITES' AUDIENCES ARE, HOWEVER, INCLUDED AS PART OF THEIR PARENT STATION'S AUDIENCE IF THE SATELLITE OPERATES WITHIN THE APPROPRIATE GEOGRAPHIC BOUNDS.

[b] CITY AND COUNTY SHARES ARE BOTH CALCULATED FROM THE ARBITRON 1973 COUNTY REPORTS BASED ON MAY AND NOVEMBER 1972 AND FEBRUARY/MARCH 1973 SURVEYS. THE CITY SHARE IS ACTUALLY THE HOME COUNTY SHARE OF THE CROSSOWNED STATION EXPRESSED AS A PERCENTAGE OF THE SUM OF THE COUNTY SHARES OF ALL STATIONS BASED IN THE CITY. THE COUNTY SHARE IS THE CROSSOWNED STATION'S SHARE EXPRESSED AS A PERCENTAGE OF THE SHARES OF ALL COUNTY BASED STATIONS. THE SMSA AND ADI SHARES ARE CALCULATED FROM THE ARBITRON DAY PART AUDIENCE SUMMARY FOR NOVEMBER 1973. THE DIFFERENCE IN SURVEY PERIODS MAY ACCOUNT FOR SOME SHIFTS BETWEEN CITY AND COUNTY SHARES ON THE ONE HAND AND SMSA AND ADI SHARES ON THE OTHER.

[c] NA IS ENTERED FOR THOSE COMMUNITIES WHICH WERE NOT PART OF AN SMSA AS OF NOVEMBER 1,1973.

[d] KHBC HAS BEEN GRANTED A CONSTRUCTION PERMIT BUT WAS NOT ON THE AIR DURING 1973.

[e] WHTV, THE ADI COMPETITOR OF WTOK, IS NOT LISTED IN THE DAY-PART AUDIENCE SUMMARY. ITS SHARE WAS ASSUMED TO BE 0.

[f] "CITY" INCLUDES MANHATTAN ONLY. "COUNTY" INCLUDES THE FIVE BOROUGHS OF NEW YORK.

[g] AUDIENCE SHARES FOR WHKY ARE NOT AVAILABLE.

Table 10: CONCENTRATION INDICES FOR NEWSPAPER-TELEVISION COMBINATIONS USING FOUR DIFFERENT MEDIA WEIGHTINGS

NUMBER	STATE	CITY	AREA OF DOMINANT INFLUENCE	ADI RANK	NAME OF NEWSPAPER	TV CALL SIGN	RADIO STATIONS #CO-OWNED	RADIO STATIONS # IN CITY	CONCENTRATION INDICES IN CITY OF LICENSE: DEJONCK-HEERE 40-40-20	LITWIN 44-39-17	ROPER INFORMATION 47-37-16	ROPER BELIEVABILITY 62-28-10
1	ALA	ANNISTON	ANNISTON	193	ANNISTON STAR	WHMA	2	4	90	92	92	95
2	ALA	BIRMINGHAM	BIRMINGHAM	47	BIRMINGHAM NEWS	WAPI	2	16	56	55	54	49
3	ARK	LITTLE ROCK	LITTLE ROCK	55	ARKANSAS DEMOCRAT	KTHV	0	10	26	31	31	31
4	CAL	FRESNO	FRESNO	73	FRESNO BEE	KMJ	2	16	57	57	56	51
5	CAL	SACRAMENTO	SACRAMENTO-STOCKTON	26	SACRAMENTO BEE	KOVR	2	15	38	37	36	33
6	CAL	SAN FRANCISCO	SAN FRANCISCO	6	SAN FRANCISCO CHRONICLE	KRON	1	26	51	51	50	44
7	COL	DENVER	DENVER	29	DENVER POST	KHBC	0	20	[a]	[a]	[a]	[a]
8	DC	WASHINGTON	WASHINGTON	9	WASHINGTON STAR	WMAL	2	16	33	33	33	31
9	DC	WASHINGTON	WASHINGTON	9	WASHINGTONPOST	WTOP	1	16	31	31	31	31
10	FLA	TAMPA	TAMPA-ST PETERSBURG	20	TAMPA TRIBUNE & TIMES	WFLA	2	11	58	58	57	52
11	GA	ALBANY	ALBANY	148	ALBANY HERALD	WALB	0	7	80	83	84	90
12	GA	ATLANTA	ATLANTA	17	ATLANTA JOURNAL & CONSTITUTION	WSB	2	16	58	57	56	52
13	IDA	IDAHO FALLS	IDAHO FALLS-POCATELLO	172	IDAHO FALLS POST REGISTER	KIFI	0	5	62	63	63	62
14	ILL	CHAMPAIGN	SPRINGFIELD-DECATUR-CHAMPAIGN	74	CHAMPAIGN COURIER & NEWS GAZETTE	WCIA	2	5	74	75	74	73
15	ILL	CHICAGO	CHICAGO	3	CHICAGO TRIBUNE & CHICAGO TODAY	WGN	1	28	26	25	25	21
16	ILL	CHICAGO	CHICAGO	3	CHICAGO DAILY NEWS & SUN TIMES	WFLD	0	28	21	21	20	16
17	ILL	QUINCY	QUINCY-HANNIBAL	124	QUINCY HERALD-WHIG	WGEM	2	4	90	92	92	95
18	ILL	ROCK ISLAND	DAVENPORT-ROCK ISLAND-MOLINE	67	ROCK ISLAND ARGUS	WHBF	2	2	100	100	100	100
19	IND	BLOOMINGTON	INDIANAPOLIS	18	BLOOMINGTON-BEDFORD COURIER TRIBUNE	WTTV	2	2	73[b]	74[b]	75[b]	81[b]
20	IND	ELKHART	SOUTH BEND-ELKHART	87	ELKHART TRUTH	WSJV	2	4	90	92	92	95
21	IND	SOUTH BEND	SOUTH BEND-ELKHART	87	SOUTH BEND TRIBUNE	WSBT	2	7	68	68	68	65

979

22	IND	TERRE HAUTE	TERRE HAUTE	113	TERRE HAUTE STAR & TRIBUNE	WTHI	2	7	69	69	69	66
23	IOWA	CEDAR RAPIDS	CEDAR RAPIDS-WATERLOO	70	CEDAR RAPIDS GAZETTE	KCRG	1	6	58	58	57	53
24	IOWA	DES MOINES	DES MOINES	62	DES MOINES REGISTER & TRIBUNE	KRNT	2	11	60	60	59	55
25	IOWA	MASON CITY	ROCHESTER-MASON CITY-AUSTIN	130	MASON CITY GLOBE GAZETTE	KGLO	1	4	85	87	88	93
26	KAN	TOPEKA	TOPEKA	129	TOPEKA STATE JOURNAL & CAPITAL	WIBW	2	7	73	73	73	73
27	KY	LOUISVILLE	LOUISVILLE	36	LOUISVILLE COURIER JOURNAL & TIMES	WHAS	2	12	56	57	56	50
28	KY	PADUCAH	PADUCAH-HARRIS-BURG-CAPE GIRARDEAU	72	PADUCAH SUN DEMOCRAT	WPSD	0	5	67	68	68	70
29	LA	BATON ROUGE	BATON ROUGE	101	BATON ROUGE ADVOCATE & STATE TIMES	WBRZ	2	11	60	60	59	55
30	LA	SHREVEPORT	SHREVEPORT-TEXARKANA	58	SHREVEPORT JOURNAL	KSLA	2	11	66	66	66	64
31	ME	PORTLAND	PORTLAND-POLAND SPRING	75	PORTLAND PRESS HERALD EXPRESS & TELEGRAM	WGAN	2	7	66	66	66	62
32	MD	BALTIMORE	BALTIMORE	19	BALTIMORE NEWS AMERICAN	WBAL	2	18	28	30	29	30
33	MD	BALTIMORE	BALTIMORE	19	BALTIMORE SUN	WMAR	1	18	42	43	43	43
34	MICH	DETROIT	DETROIT	7	DETROIT NEWS	WWJ	2	21	41	41	41	39
35	MINN	DULUTH	DULUTH-SUPERIOR	110	DULUTH NEWS TRIBUNE & HERALD	WDSM	1	7	54	53	52	46
36	MINN	MINNEAPOLIS-ST PAUL	MINNEAPOLIS-ST PAUL	13	MINNEAPOLIS STAR & TRIBUNE; ST PAUL PIONEER PRESS & DISPATCH	WCCO	2	16	61	61	60	57
37	MISS	COLUMBUS	COLUMBUS	165	COLUMBUS COMMERCIAL DISPATCH	WCBI	1	4	85	87	88	93
38	MISS	JACKSON	JACKSON	80	JACKSON CLARION-LEDGER & NEWS	WJTV	2	12	58	59	58	54
39	MISS	MERIDIAN	MERIDIAN	162	MERIDIAN STAR	WTOK	1	7	83	85	86	90
40	MO	JOPLIN	JOPLIN-PITTSBURG	118	JOPLIN GLOBE	KOAM	0	5	53	53	52	48
41	MO	ST LOUIS	ST LOUIS	12	ST LOUIS POST DISPATCH	KSD	1	15	36	36	36	35
42	MO	ST LOUIS	ST LOUIS	12	ST LOUIS GLOBE DEMOCRAT	KTVI	0	15	27	28	28	28
43	MO	SPRINGFIELD	SPRINGFIELD	88	SPINGFIED LEADER,NEWS & PRESS	KYTV	1	9	57	57	56	52
44	NEB	HASTINGS	LINCOLN-HASTINGS KEARNY	81	HASTINGS TRIBUNE	KHAS	1	3	87	89	89	93
45	NEB	OMAHA	OMAHA	63	OMAHA WORLD HERALD	KETV	0	12	53	54	53	48
46	NEV	LAS VEGAS	LAS VEGAS	144	LAS VEGAS REVIEW-JOURNAL	KORK	2	10	43	43	43	42

47	NY	BUFFALO	BUFFALO	27	BUFFALO NEWS	WBEN	2	15	45	44	44	42
48	NY	NEW YORK CITY	NEW YORK CITY	1	NEW YORK DAILY NEWS	WPIX	1	29	17	16	16	12
49	NY	ROCHESTER	ROCHESTER	59	ROCHESTER TIMES-UNION, DEMOCRAT & CHRONICLE	WHEC	0	12	54	55	54	50
50	NY	SYRACUSE	SYRACUSE	68	SYRACUSE HERALD JOURNAL, HERALD AMERICAN &POST	WSYR	2	10	58	57	56	51
51	NY	WATERTOWN	WATERTOWN-CARTHAGE	163	WATERTOWN TIMES	WWNY	1	4	85	87	88	93
52	NC	GREENSBORO	GREENSBORO-HIGH POINT-WINSTON SALEM	52	GREENSBORO DAILY NEWS & RECORD	WFMY	0	7	80	83	84	90
53	NC	HICKORY	CHARLOTTE	34	HICKORY RECORD	WHKY	2	5	88	90	90	94
54	ND	FARGO	FARGO	95	FARGO FORUM	WDAY	2	4	71	71	70	66
55	OHIO	AKRON	CLEVELAND	8	AKRON BEACON JOURNAL	WAKR	2	5	88	90	90	94
56	OHIO	CINCINNATI	CINCINNATI	23	CINCINNATI POST & TIMES STAR	WCPO	0	13	35	36	36	37
57	OHIO	CLEVELAND	CLEVELAND	8	CLEVELAND PRESS & NEWS	WEWS	0	17	34	34	34	35
58	OHIO	COLUMBUS	COLUMBUS	32	COLUMBUS DISPATCH	WBNS	2	12	58	58	57	53
59	OHIO	DAYTON	DAYTON	41	DAYTON NEWS & JOURNAL HERALD	WHIO	2	7	64	63	63	58
60	OHIO	YOUNGSTOWN	YOUNGSTOWN	85	YOUNGSTOWN VINDICATOR	WFMJ	1	7	57	56	55	51
61	OKLA	OKLAHOMA CITY	OKLAHOMA CITY	39	OKLAHOMA CITY OKLAHOMAN & TIMES	WKY	1	15	48	48	47	46
62	OREG	PORTLAND	PORTLAND	25	PORTLAND OREGONIAN & OREGON JOURNAL	KOIN	2	19	54	55	54	48
63	PA	ERIE	ERIE	131	ERIE NEWS & TIMES	WSEE	0	6	53	53	52	48
64	PA	HARRISBURG	HARRISBURG-YORK-LANCASTER-LEBANON	45	HARRISBURG PATRIOT & NEWS	WTPA	1	7	63	63	62	59
65	PA	JOHNSTOWN	JOHNSTOWN-ALTOONA	71	JOHNSTOWN TRIBUNE-DEMOCRAT	WJAC	2	4	83	84	84	84
66	PA	LANCASTER	HARRISBURG-YORK-LANCASTER-LEBANON	45	LANCASTER INTELLIGENCER, JOURNAL, NEW ERA & NEWS	WGAL	2	5	79	80	79	80
67	SC	GREENVILLE	GREENVILLE-SPARTANBURG-ASHEVILLE	38	GREENVILLE NEWS PIEDMONT	WFBC	2	9	60	61	60	55
68	TENN	MEMPHIS	MEMPHIS	31	MEMPHIS COMMERCIAL APPEAL & PRESS SCIMITAR	WMC	2	15	56	55	54	49
69	TEX	DALLAS	DALLAS-FT WORTH	11	DALLAS TIMES-HERALD	KDFW	0	15	38	39	39	42
70	TEX	DALLAS	DALLAS-FT WORTH	11	DALLAS MORNING NEWS	WFAA	2	15	42	43	44	46
71	TEX	HOUSTON	HOUSTON	14	HOUSTON POST	KPRC	1	22	33	35	35	33

72	TEX	TEMPLE	TEMPLE-WACO	108	TEMPLE TELEGRAM	KCEN	1	2	90	92	92	95
73	TEX	TEXARKANA	SHREVEPORT-TEXARKANA	58	TEXARKANA GAZETTE & NEWS	KTAL	2	5	88	90	90	94
74	UTAH	OGDEN	SALT LAKE CITY	50	OGDEN STANDARD	KUTV	0	5	49	49	48	42
75	UTAH	SALT LAKE CITY	SALT LAKE CITY	50	SALT LAKE CITY DESERET NEWS	KSL	2	17	55	55	54	49
76	VA	NORFOLK-PORTSMOUTH	NORFOLK-HAMPTON-PORTSMOUTH-NEWPORT NEWS	46	NORFOLK VIRGINIAN PILOT & LEDGER STAR	WTAR	2	9	84	87	88	92
77	WASH	SPOKANE	SPOKANE	77	SPOKANE SPOKESMAN, REVIEW & CHRONICLE	KHQ	2	16	57	57	56	51
78	WVA	BLUEFIELD	BLUEFIELD-OAK HILL-BECKLEY	132	BLUEFIELD TELEGRAPH & SUNSET NEWS OBSERVER	WHIS	2	3	93	94	95	97
79	WISC	MILWAUKEE	MILWAUKEE	24	MILWAUKEE JOURNAL & SENTINEL	WTMJ	2	16	56	55	54	49
80	WISC	WAUSAU	WAUSAU-RHINELANDER	135	WAUSAU RECORD HERALD	WSAU	2	5	72	72	71	69

NOTES:

THE METHOD OF COMPUTING THESE INDICES IS DESCRIBED IN THE TEXT. WEIGHTINGS FOR NEWSPAPERS, TV STATIONS AND RADIO STATIONS ARE LISTED UNDER EACH APPROACH.

* KHBC HAS BEEN GRANTED A CONSTRUCTION PERMIT BUT WAS NOT ON THE AIR DURING 1973.

♦ CALCULATIONS BASED ON UNAUDITED CIRCULATION FIGURES FOR THE BLOOMINGTON-REDFORD COURIER TRIBUNE.

[Letter to Chairman Wiley and Commissioner Hooks from Edward Hayes on behalf of the National Black Media Coalition (September 9, 1974)]

Dear Chairman Wiley and Commissioner Hooks:

During statements made by members of the National Black Media Coalition in the public hearing on July 24, 1974, concerning F.C.C. Docket 18110, you requested NBMC to make available to you its views on how the F.C.C., pursuant to an order requiring divestiture on newspaper and broadcast property which is jointly-held in one market, could limit swaps between owners of such broadcast property. This letter presents NBMC's views on this important matter.

Once the Commission rules that cross-ownership of a newspaper and a broadcast property within a market is indeed contrary to the general public interest, the Commission must limit the ability of cross-owners to swap broadcast properties in each other's cities. This limitation is necessary in order to facilitate the acquisition of broadcast properties by minority persons, who now own less than .5% of the country's broadcast facilities.[1]

Minority entrepreneurs must have an opportunity to gain ownership of broadcast property in desirable mar-

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[1]The U.S. Commission on Civil Rights has reported that of approximately 7,500 radio stations throughout the country, only 10 are owned by minorities and that of the more than 1,000 television stations, none is owned by minorities. *Federal Civil Rights Enforcement Efforts*, A Report of the U.S. Commission on Civil Rights, p. 280 (1971). These figures are now only slightly outdated. NBMC believes that in 1974 there are still no more than 33 minority owned radio stations. As for television stations, there is one minority-owned VHF facility in St. Croix, Virgin Islands, and a construction permit has recently been approved for a UHF facility in Detroit.

kets.[1] Indeed, the Commission itself has already recognized that the number of minority broadcast licensees is dismally low.[2] Divestiture would provide the Commission with an excellent occasion to take steps aimed toward assuring minority persons of opportunities to become licensees in major markets around the country. Such action would be in furtherance of the basic goal of the Communications Act of 1934: diversity.

In order to foster greater diversity in the media and to facilitate minority ownership, NBMC suggests that the Commission adopt procedures pursuant to the following:

I. In a transfer of a broadcast property as a result of Commission required divestiture, the transferor must entertain bids for its property with preference being given to competing potential transferees in the following order:

a. local[3] entrepreneurs whose principals represent or embody substantial, if not controlling, minority interests,

[1] See NBMC's Petition for Rulemaking, RM-2278, filed November 12, 1973. Section IV of the Petition, entitled "The Commission Should Facilitate Increased Minority Ownership of Broadcast Stations," recommended actions the Commission could take, other than divestiture, to make ownership of broadcast media more reflective of our heterogenous society.

[2] See, for example, *Howard University*, 19 R.R. 2d 234, 236 (1970), wherein the Commission stated that there exists a "chronic national shortage of Black broadcasters."

[3] In examining transfer applications the Commission must narrowly define the term "local" so that the relevant market does not become regional rather than local. There is currently confusion about how this is to be accomplished. In *Frontier Broadcasting Co.*, 21 F.C.C. 2d 570 (1970), the Commission rejected an argument that the total Grade B contour was the relevant area for an examination of concentration of media control in the Cheyenne, Wyoming, market. Instead, the Commission determined that the

[footnote continued]

b. non-local entrepreneurs whose principals represent or embody substantial, if not controlling, minority interests,

c. other local entrepreneurs,

d. other non-local entrepreneurs;[1]

II. Subsequent to a Commission divestiture order the licensee shall:

a. give notice of the required divestiture to its service area for six months beginning with the time at which the order was given, and

b. among other procedures which the licensee deems appropriate, give notice as required in a. through an-

market was the area in and around Cheyenne. However, the Commission appeared to reverse its judgment in *Chronicle Broadcasting Co.*, 40 F.C.C. 2d 775 (1973), *appeal pending sub nom. Kihn* v. *F.C.C.*, D.C. Cir. Case No. 73-1627. The Commission's reliance in *Chronicle* on a Grade B contour for determining the extent of concentration of control is one of the issues which has been appealed. We note, in addition, that the United States Department of Justice has sought to intervene in the *Kihn* case to contest the Commission's market definition therein.

[1] NBMC recognizes that the weight presently given local ownership is not as great as that which was once expressed by the Commission in its *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 396, 5 RR 2d 1901, 1910-11 (1965): "Local residence complements the statutory scheme and Commission allocation policy . . . and local ownership also generally accords with the goal of diversifying control of broadcast stations." However, local ownership is nonetheless current Commission policy and was recently supported by the U.S. Court of Appeals in *TV9, Inc.*, 495 F.2d 929 (D.C. Cir. 1973; petition for cert. pending on other issues). Also, it should be pointed out that, while swaps between local cross-owners would increase the number of absentee licensees, such swapping would be preferable—particularly when an absentee owner has minority participation—to allowing the inherent conflicts of interest of co-ownership of a newspaper and a television station in the same town.

nouncements broadcast daily over the station to be divested and through weekly newspaper advertisements. At least fifty percent of the broadcast announcements must be aired during the time periods of highest billing;

III. In the event that a complaint is filed with the Commission to the effect that a transferor did not entertain bids as prescribed, or provide the proper notice within its service area, the Commission shall:

a. notify the transferor of the charge,

b. require an affirmative showing by the transferor that it has indeed proceeded as prescribed in Sections I. and II., and

c. in the event of failure to proceed in the manner prescribed, dismiss any transfer application filed by the transferor.[1]

It is significant to note that the procedures outlined above[2] would limit swaps, facilitate minority ownership, and yet not violate the prohibition of Section 310(b) of the Communications Act, which prevents the Commission from comparing license transfer applicants. As amended in 1952, the Section did not contemplate divestiture transfers pursuant to a Commission order. It is thus not conclusive of the Commission's authority to limit such transfers.

[1]The Commission should also consider requiring, for transfers pursuant to a divestiture order, a year's moratorium on transfers other than to minority persons.

[2]These procedures should pertain to all transfer situations. However, NBMC realizes that this issue might be more appropriately discussed in another rulemaking proceeding.

Those transfers made pursuant to a divestiture order would be very different from normal transfers made for the private benefit of the parties involved.[1] Safeguards taken by the Commission to assure the greatest possible public benefits can, and should, be established in this rulemaking proceeding.[2]

At the end of the transfer process which NBMC suggests, the Commission would have only one transfer application before it. The Commission itself would therefore not be called upon to make *comparisons among* transfer applicants, which is the *only* procedure barred by 310(b) of the Act. Challenges to a transfer application could be submitted if a party could support an allegation that the transfer procedures pursuant to a divestiture order had not been followed. But this would not go to the comparative merits of another potential applicant. They would be addressed solely to the technical question of whether certain procedures had been followed.

As has been recognized by various informed bodies, including the F.C.C., action to spur increased minority broadcast ownership has long been warranted. The United States Commission on Civil Rights, in comment-

[1]Transfers made pursuant to a divestiture order would be "forced" divestitures which would be eligible for special treatment, such as involuntary conversion benefits under the tax laws, 26 U.S.C. 1071; see also, *Tax Certificates*, 19 R.R. 2d 1831 (1970). They can, therefore, be given *more* stringent requirements by the F.C.C.

[2]In its *Policy Statement on Comparative Hearings on Renewals Applicants*, 22 F.C.C. 2d 424, 428 (1970), the Commission stated: "... the overall structure of the industry, so far as multiple ownership and diversification are concerned, should be the subject of general rulemaking proceedings rather than ad hoc decisions in renewal hearings."

ing upon the "almost total absence of minorities from ownership of radio and television stations"[1] has stated:

> The FCC . . . should amend [its] procedures concerning issuances (sic) of licenses, which currently tend to protect the economic interests of existing licensees, to facilitate minority group entrance as entrepreneurs.[2]

The Court of Appeals, in discussing minority ownership of broadcast facilities, has told the FCC:

> As new interest groups and hitherto silent minorities emerge in our society they should be given more stake and chance to broadcast on our radio and television frequencies.[3]

The Commission has also touched upon the same general concern in its opinion in *Lamar Life Broadcasting Co.*, wherein it stated that it considered "active and increased Negro participation in the broadcast communications field" to be of "crucial significance."[4]

As indicated in its oral presentation to the Commission on July 24, NBMC supports the implementation of rules requiring divestiture. It is only through such rules that the Commission can secure the public needs for multiplicity of views on the airwaves and for diversity of ownership. The Commission must take affirmative action aimed at making certain that broadcast ownership, as well

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[1] *Federal Civil Rights Efforts*, A Report of the United States Commission on Civil Rights, p. 280 (1971).

[2] *Ibid.*, fn. 3 at 361.

[3] *Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 44, 447 F.2d 1201, 1212, fn. 36 (1971).

[4] *Lamar Life Broadcasting Co.*, 14 F.C.C. 2d 431, 436, fn. 13 (1968).

as programming, is reflective of the pluralistic nature of our society. As Commissioner Hooks declared in his concurring statement in *Mid-Florida Television Corp.*:

> The public 'interest' benefit in licensing minorities is manifest; the situation has reached the point of public 'necessity'.

[Barnett, S., "Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary Markle Foundation" (September 23, 1974), pp. 1-2; 10-19; 31-64]

PREFACE

This report, prepared under a grant from the John and Mary R. Markle Foundation, deals with the "cross-ownership" of mass media outlets in the same city, a controversial issue of public policy currently pressing upon the Federal Communications Commission, the Congress, the Justice Department, and possibly the courts. Somewhat unusually, the report takes the form of a critique and supplement to two other reports, drafts prepared by the Rand Corporation that were circulated for comments and criticisms on August 7, 1974. Rand has been working since April 1973, under a grant from the National Science Foundation, on "a study to assess the research literature and other writings dealing with the ownership and control of radio, television, cable communications, and newspapers," in order "to determine what factual evidence there is on the effects of media ownership and its relevance to present government policies. . . ." The prospective reports circulated by Rand in August are fruits of this study. One of them (which I shall call the "current knowledge" report) is *Concentration of Mass Media Ownership: Assessing the State of Current Knowledge* (R-1584-NSF), by Walter S. Baer, Henry Geller, Joseph A. Grundfest, and Karen B. Possner, dated September 1974 (183 double-spaced pages in its draft form), which

was prepared under the NSF grant. The other (which I shall call the "options" report) is *Newspaper-Television Station Crossownership: Options for Federal Action*, by Walter S. Baer, Henry Geller, and Joseph A. Grundfest, dated August 1974 (51 double-spaced pages), which was "written with the support of the John and Mary R. Markle Foundation under a grant to Rand's Communications Policy Program" and "draws in large part on the knowledge and materials accumulated under the assessment supported by the National Science Foundation."

I was among those to whom Rand circulated copies of the draft reports. I had had no previous connection with Rand's work on these projects, and have prepared this report only since receiving and examining the Rand drafts. Besides being submitted to the Markle Foundation, this report is being made available to Rand (to whom its substance was communicated by telephone in August), to policy-makers at the FCC, the Congress, and the Justice Department, to the National Science Foundation, and to others who are involved or interested in the subject. I am grateful to the Markle Foundation for funding the report's preparation, and I hope it may contribute to the understanding of this issue and the formulation of policy on it.

The report consists of two parts, a relatively brief "critique" of the Rand reports and a more lengthy "supplement" to them. Part I, the critique, notes a number of respects in which I find the Rand drafts wrong, misleading, or deficient. (Most of these points have already been communicated to Rand and therefore may not apply to the final versions of the Rand reports.) Part II, the supplement (and in part a critique as well), is addressed to what I consider the main inadequacy of the

Rand reports, and a serious one. This is Rand's conclusion, after an assertedly thorough and systematic search of the published sources and other materials, that there is a "lack of concrete evidence of harm from cross-ownership," that "the evidence on the effects of cross-media ownership supports neither allegations of substantial harm nor those of substantial public benefits from newspaper-television combinations." I believe there is a considerable amount of concrete evidence of harm from cross-ownership—consisting mainly of individual examples found in a variety of published, reliable sources—which in its aggregate demonstrates not only substantial and widespread harm but a clear tendency to produce it. Rand has ignored all this evidence, thanks to a methodological approach which (for reasons I discuss) seems cramped and self-defeating. Although I have made no systematic search to collect the evidence, I list and describe in Part II a number of examples that have come to my attention, dealing first with "harmful effects of media ownership in general" (for reasons I explain), and then specifically with "harmful effects of local-media cross-ownership." I note that a comprehensive search could doubtless collect many more examples, and I discuss the inferences that can be drawn in any event as to the relationship between the amount of such evidence that comes to light and the amount of harmful effects that exists. I note further that the evidence presented is relevant not only to the existence of harmful effects from cross-ownership, but also to the policy advantages and disadvantages of some of the "options for federal action" that Rand attempts to evaluate.

* * * * *

II.
SUPPLEMENT

A. A Note on "Evidence" and Methodology

The most serious deficiency of the prospective Rand reports is their disregard for extensive published evidence concerning harmful effects of local-media cross-ownership. This is the more surprising because a thorough assessment of published material on this question was, professedly, the precise purpose of the NSF-funded "current knowledge" project. Rand undertook "a study to assess the research literature and other writings dealing with the ownership and control of radio, television, cable communications, and newspapers." "Current knowledge" report, at iii. ". . . Rand considered it important to sift the literature systematically, and as dispassionately as possible, with two goals in mind: first, to determine what factual evidence there is on the effects of media ownership and its relevance to present government policies . . . ." *Ibid.* "This study drew on a large number of published books and articles, graduate theses and dissertations, Congressional reports and testimony, inquiries of the Federal Communications Commission, and other published and unpublished sources. . . . Our intent has been to review and critically assess what we know about media ownership and control as an aid to government officials, people involved in the mass media, and concerned citizens." *Id.* at iv. "Chapter II [of the "current knowledge" report] describes the evidence concerning the influence of media ownership on the performance of media outlets as economic units and information sources." *Ibid.* "This assessment of more than 500 books, articles, dissertations, FCC filings, and testimony before Congress addressed itself to the principal question: In what ways does media ownership influence media performance?" *Id.* at 82.

After all that searching, Rand comes back empty-handed. With one or two exceptions, Rand reports, there is no published evidence of harmful effects from local-media cross-ownership. The two studies of Zanesville, Ohio, found harmful effects from the media monopoly there, as compared with comparable cities with media competition, "but this result cannot simply be extrapolated to all other media monopolies; the policy question is whether there is a general tendency for media monopolists to provide poorer service. Additional evidence from other cities is needed to answer that question." "Options" report, at 10. There is a "lack of concrete evidence of harm from crossownership." *Id.* at 11. "The evidence on the effects of cross-media ownership supports neither allegations of substantial harm nor those of substantial public benefits from newspaper-television combinations." *Id.* at 36.

> Briefly stated, the results of assessing the current knowledge about concentration of media ownership can be expressed in the well-known Scotch verdict: "not proved." As described throughout this section, the evidence relating media ownership to economic or content performance is generally weak and unconvincing. Most studies simply show no significant differences among media ownership classes. Differences repeated in certain studies have not been reproduced in other situations. And many of the prior studies seem flawed by a lack of data or by methodological inadequacies such as a failure to control for other important variables. ["Current knowledge" report, at 82-83.]

Rand suggests that the paucity of evidence is due to the difficulty of the "research problem":

> As described above, the research relating media ownership to economic and content performance is neither extensive nor deep. The results to date provide meager evidence on the benefits and harm from media ownership concentration. In large part, this is because measuring the effects of ownership is a difficult research problem. To yield valid results, studies must control for many other variables that are likely to have far stronger effects than ownership—market size, circulation and audience shares, competitors in the market, and so forth. Measuring the impact of media ownership may be like measuring the strength of a ripple amidst much larger waves. [*Id.* at 149]

Again pondering the reason for the lack of evidence, Rand writes:

> . . . There are at least three alternative explanations for the generally inconclusive results of previous studies:
>
> 1. there are in fact no significant differences in the economic and content performance of group owned or cross owned media outlets compared with independently owned outlets;
>
> 2. the effects of media ownership are qualitative and too subtle to be found with quantitative research techniques;
>
> 3. the effects are there, but past studies have looked in the wrong places or have not used the best available analytic tools. [*Id.* at 83.]

There is a fourth explanation: Rand has not looked in the right places. Rand's basic problem lies in the assumption that harmful effects from media cross-ownership can only be demonstrated through "quantitative research techniques"—techniques that "control for other important variables" and thus prove, through the indirect means of eliminating the other possibilities, that a measured difference in media performance in two comparable

situations must be due to the differences in ownership. Rand is surely right that this is "a difficult research problem." People, cities, geography, and numerous other aspects of life being what they are, there may well be no pair of communities in the country, and no pair of newspapers or broadcast stations, as between which a methodological critic cannot find "variables" that are beyond laboratory-style "control." But in straining at this kind of inferential proof of harm from cross-ownership, Rand overlooks the possibility of direct proof. If medical science knew how cancer was caused and knew that cigarette smoke caused it in a specific physiological way, it would not have to try to establish the causal relationship by comparing cancer rates in groups of smokers and nonsmokers carefully chosen to control for all other possible variables. To use Rand's analogy, "measuring the impact of media ownership may be like measuring the strength of a ripple amidst much larger waves," *if* the only available research method is to compare the water movements in two ponds in "quantitative" terms; but if one observes a rock thrown into a pond and a ripple starting where it fell, one has done "research" and one has "evidence" that the rock caused the ripple. If such an effect cannot be "found with quantitative research techniques" because of the larger waves due to other causes, that does not necessarily mean the effect is "subtle"; thanks to direct evidence, it may be palpable.

So here, there may be direct evidence that local-media cross-ownership causes harmful effects on the economic or content performance of media, in the form of observations of its happening in specific cases. It may be observed, for example, that the owner of a newspaper-broadcast combination orders one outlet to suppress, insert, or distort news stories involving the other outlet,

or orders both outlets to give the same kid-gloves treatment to stories in which he is interested. Or it may be observed—a less direct form of evidence, but still susceptible of specific and persuasive documentation—that this is in fact the way particular stories involving the owner have been handled by the cross-owned outlets. It may be observed that cross-owned newspapers in at least some cases favor their own broadcast stations over competing stations in their radio and TV listings; or that a newspaper-broadcast combine competing with another newspaper offers cut-rate broadcast time to merchants who advertise in its newspaper, or that such a combination refuses to sell broadcast time to someone who won't advertise in the newspaper; or that extensive professional interviews in a community with highly concentrated media control, or articles by respected journalists based on interviews in such communities, report specific harmful effects resulting from the concentrated control; or that cross-owned newspapers and radio stations in small towns with few if any other local media send a single reporter to town meetings, share news tips, and otherwise deny the local public the journalistic diversity that separate owners would provide; and so forth.

Indeed, because of the problems noted by Rand with "quantitative research techniques," the existence—or nonexistence—of such observations may be the best kind of evidence one can expect on the question of harmful effects from local-media cross-ownership. (Rand says in the preface to the "current knowledge" report, at iii, that one of the "crucial issues" is, "Do media monopolies present one-sided verisons of the news?" It is hard to see how one can thoroughly investigate that issue while ignoring, as Rand does, the existence of published accounts, respectable and documented, reporting specific

instances in which media monopolies have done precisely that.)

True, one has to consider the number of such occurrences, which could be merely aberrational. But this is equally true of Rand's "quantitative" approach. Even when a satisfactorily matched pair of cities is found and the other variables satisfactorily controlled, as in the Zanesville studies (or at least one of them), Rand discounts the evidence because it only relates to one city: "These questions cannot be answered from the Zanesville results alone; Zanesville may illustrate a specific, isolated problem. Additional survey research would be needed to extend these results to other media monopoly communities." "Current knowldege" report, at 148; see also "options" report, at 10.

With either kind of evidence, evaluating its quantity and quality is a process—and ultimately a policy judgment—distinct from the process of collecting the evidence in the first place. Rand set for itself, and now claims to have performed, the task of collecting the evidence that exists—"to sift the literature systematically . . . to determine what factual evidence there is on the effects of media ownership . . . ." ("current knowledge," at iii). And yet Rand has ignored, save for the Zanesville studies, the extensive published evidence that does exist of the kind just sketched, evidence showing specific harmful effects plainly caused by local-media cross-ownership in particular cases. It is hard to see why the facts of such cases are not part of ". . . what we know about media ownership and control . . ." (*id*. at iv), or of ". . . . the evidence concerning the influence of media ownership on the performance of media outlets as economic units and information sources" (*ibid*.). It is hard to see why they do not constitute ". . . concrete evidence of

harm from cross ownership" ("options report, at 11), or do not shed light on ". . . the principal question: In what ways does media ownership influence media performance?" ("current knowledge" report, at 82).

Rand's performance of the task of systematically searching out and collecting such evidence would have been particularly useful, because no one else has done it and it is not easy. No consultant has been commissioned by the NAB to collect this kind of material for filing with the FCC. The material is not indexed under any common heading in any library or catalog. Its very nature, moreover, generally rules it out of the kind of conspicuous publications that would bring it to ready notice. The effects of local-media cross-ownership are, of course, generally "local" in their impact and substantive interest; hence they customarily go unnoticed by national publications and unreported even when they are noticed. At the local level, meanwhile, the blockage is even worse; harmful effects of newspaper-broadcast cross-ownership are obviously unlikely to be reported by the newspaper involved, and in almost all cases this will be the only daily newspaper in town (newspaper monopoly now prevails in some 97 percent of the cities that have daily newspapers). One has to find the evidence, therefore, in other sorts of publications. Journalism reviews, both national and local, are a prime source, and one would have thought an obvious one, though Rand gives no indication of recognizing their existence. The national trade journals of the broadcasting and newspaper industries are another. Other sources at the local level include "city" magazines, weekly and "alternative" newspapers, and other publications which, though unorthodox as research sources, tend to be the only local publications that are not controlled by the newspaper-broadcast combine and are thus in a position

to report on its conduct and effects. But there are also many more orthodox and obvious sources in which the evidence appears, including many of the sort that Rand claims to have sea:ched. These include books and articles, Congressional hearings, not just "FCC filings" but also decided cases of the FCC, and decisions of the courts as well.

I have not attempted any systematic search of the kind Rand said it was undertaking. I was not addressing myself to this problem before I received Rand's prospective reports. Still, working only from material that has come to my attention, I can offer a number of examples of published evidence of harmful effects from local-media cross-ownership. I shall limit the list to published materials, plus FCC filings, and shall limit it further to persons, publications, or circumstances meeting a reasonable standard of reliability or credibility. I am excluding, for example, quite a few "mere" allegations, even though made in FCC filings, that are not accompanied, to my knowledge, by persuasive documentation or some other warrant of reliability. The examples I am including admittedly vary in their force as evidence. Some constitute actual legal determinations by the FCC or the courts; others books, articles, or Congressional testimony by respectable scholars or journalists (myself included, with apologies), almost always supported by specific documentation; others testimony by respectable witnesses with documentation or first-hand knowledge of the facts they relate. The examples vary also in their scope, impact, and policy importance. But in their aggregate they show harmful effects from local-media cross-ownership which, it seems to me, are substantial, widespread, and can hardly be dismissed as aberrational. And this evidence, I would repeat, is only what has come to my

limited attention; a systematic search of the likely materials would certainly disclose many more examples.

Furthermore, in evaluating the policy significance of whatever volume of evidence is available, one must take into account the compelling inference that it represents only the tip of the iceberg. There are obvious reasons why the abuses or harmful effects of local-media cross-ownership that come to light in published form, in FCC filings, in any form at all, are probably only a small portion of the ones that exist. Some of these reasons were pointed out by former FCC Commissioner Nicholas Johnson in the *"Chet Huntley"* case. *National Broadcasting Co.*, 14 F.C.C.2d 713, 720-723 (1968) (dissenting opinion). In the first place, with respect to "half" of the output of a newspaper-broadcast combination—that of the broadcast station or stations—"there are no published and publicly available written records." Any analysis of the news content of a local broadcast station—to see, for example, how it has handled stories involving the cross-owned newspaper or the interests of the common owner—is almost always precluded by the unavailability of a transcript or written record; such studies are perforce limited to the content of the newspaper. Then, as Commissioner Johnson continued, "What appears to be self-interest is often camouflaged by 'news judgment'." 14 F.C.C.2d at 721. When a station's management orders coverage, noncoverage, or a particular kind of coverage of a particular story, even a story plainly involving its own interests, whether this constitutes an "abuse" or a legitimate exercise of news judgment depends, at least so far as the FCC is concerned, on the subjective motive of the person giving the order (see the discussion below of the *Chronicle Broadcasting* case). Since motives, and especially improper ones, often go unexpressed in documentary

or even spoken evidence, one can only assume that such harmful effects do occur without taking the form of reportable evidence.

Third, and most important here, is the point made by Commissioner Johnson as follows (with specific reference to conglomerate ownership, but applicable as well to cross-media ownership):

> Finally, most of the examples of abuse do not take a form that can be seen in the light of day. Outside phone calls encouraging stories, or urging their suppression, are not recorded, or reported, and may not even be acknowledged to one's fellow employees. Memoranda encouraging corporate obedience are not made public—with rare, and revealing, exception. And the most effective forms of communication to employees are informal: the off-hand remark, who gets the promotions, which items get used and which are killed. . . . [*Id.* at 722.]

(Scholarly support for this point, if any is needed, appears in studies I shall cite; *e.g.*, Warren Breed, "Social Control in the News Room: A Functional Analysis," *Social Forces*, May 1955, reprinted in Wilbur Schramm, MASS COMMUNICATIONS (2d ed. 1960), at 178-194.) Further, even when the abuse does take the form of a memorandum, conversation, or other communication that can be reported to the outside world, there is strong reason to assume that in the great majority of cases it is not, the reason of course being the loyalty of employees, their hopes of advancement and fears of reprisal. These considerations seem self-evident, and they surely support an inference that many if not most of the abuses and harmful effects of concentrated media control do not come to light in published or legal form. Hence those that do come out should be considered, for policy-making

purposes, as representative of a much larger totality that exists.

In the remainder of this report I list and describe some examples that have come out. Before focusing specifically on local-media cross-ownership, I deal with harmful effects of media ownership more generally. The relevance of this is explained in the introduction to the next section.

B. Harmful Effects of Media Ownership in General: Evidence of the Use of News Media to Serve the Private Interests or Views of Their Owners

Before focusing on the particular case of local-media cross-ownership, it is relevant to consider what evidence there is more generally of harmful effects of media ownership on media performance, as by the shaping of news content to serve or reflect the private interests or views of the media owners. Although Rand found no such evidence, and apparently looked for none, one would have thought it to be included in the scope of a search addressed to "... the principal question: In what ways does media ownership influence media performance?" ("Current knowledge" report, at 82.) Evidence that media owners use their outlets in self-interested ways is relevant to the issue of local-media cross-ownership because the harmful effects of such use, on either the economic or the content performance of the outlets, or on both, can only be enlarged when more than one outlet in the same community is under the same ownership.

There are three ways in which such enlargement comes about. First, ownership of a second media outlet expands the local interests of the media owner, adding to those interests a valuable property which is also an important and newsworthy local institution. If the owner of the

local newspaper sees to it that the paper suppresses or slants news stories involving the paper itself—*e.g.*, a merger, strike, libel suit, staff uprising, interest in downtown redevelopment—or involving his own or his associates' additional ownership of a local TV station, for example, will subject that important and newsworthy local institution to the same news manipulation (so that stories of FCC proceedings involving the station, for example, will be handled with kid gloves, if at all, in the newspaper). Second, the scope of the media in which the treatment takes place is also expanded. Stories affecting the newspaper or the other interests of the media owner are now subject to cozy handling not just by one local outlet, the paper, but by two (or three or four or five, when AM and FM stations and cable systems are brought under the same ownership). Third, the chance for "corrective coverage" by other local media is correspondingly reduced. Under separate ownership, the TV station could be expected to report the story that the paper is suppressing, or even to expose and attack the paper's handling of it, or otherwise to serve as watchdog on the paper and its owner with respect to the variety of local issues in which they may be interested or involved. Under common ownership with the paper, the station is most unlikely to perform this important function. Similarly, if there is evidence of economic abuse of media ownership, as by predatory or monopolistic tactics against competitors, the impact of such harm is increased by local-media cross-ownership.

So if there is substantial evidence that one way "media ownership influence[s] media performance" is by shaping that performance to serve the interests of the owner, it would seem to follow that local-media cross-ownership increases the resulting harmful effects on the local public.

At the very least, such evidence should place the "burden of proof" on the defenders of cross-ownership to adduce some reason and some evidence as to why the self-interested conduct of media owners generally—in which they are no different from most humans—does not apply to a valuable property of the owner that happens to consist of another media outlet in the same community.

And there is, of course, substantial evidence of the use of local news media to serve and reflect the private interests or points of view of their owners (apart from the editorial pages). Indeed, one hardly knows where to start. This is probably *the* dominant content of most journalism reviews, for example. To take just one current report, see "Behind the Damask Curtain," by Karl E. Meyer, in the July 1974 issue of [MORE], the well-known journalism review published in New York (at 11-14). The article describes the inadequate coverage of art museums by newspapers around the country and lists 18 major cities where the owner or editor of a daily newspaper is a trustee of the local museum. It is peculiarly pertinent here because of a follow-up, see [MORE] for August 1974, at 4, congratulating television station KAKE in Wichita, Kansas, "for proving that the air can still be free when the monopoly local newspapers attempt the crudest forms of news manipulation." This story reports that the editor of the monopoly newspapers in Wichita met privately with the president of the city's Fourth National Bank to discuss the proposed new site for the Wichita Art Museum. The newspapers thereupon ran a series of editorials (seven in five days) arguing against the proposed site and for a new one which "is close to the Fourth National Bank's glossy new $20 million building," though "this coincidence was not mentioned . . .," while other advantages of the originally

selected site were also glossed over in the papers. [MORE] reports that KAKE, however, "took on" the papers in "a dozen revealing broadcasts" which brought out the points the papers omitted, and in which "for the first time, Wichita's citizens learned of the private meeting between the editor and the bank officials, and of the Fourth National's obvious interest in changing the site." It concludes: "A full reading of the broadcast transcripts, and of the tendentious newspaper stories, suggests eloquently that in monopoly towns broadcasters have a special obligation to put on the air the news deemed unfit to print." That is not likely to happen, of course, where the newspaper owns the broadcast station. Surely the chance for such "corrective coverage" is reduced, if not eliminated, by newspaper-broadcast cross-ownership.

The self-interested influence of ownership on the performance of news media is so endemic and well known, the evidence of it so ubiquitous, that one feels a little foolish in citing examples ("so what else is new?"). Nonetheless, in view of Rand's apparent position that there is no such evidence, and the possibly similar position of the FCC, I shall cite some examples in this section. Without attempting to do more than scratch the surface of the available evidence, without using any but current issues of journalism reviews, I offer the following sampling.

* * * * *

C. Evidence of Harmful Effects of Local-Media Cross-Ownership

Given the tendency illustrated by the foregoing examples, one would expect harmful effects, of specific kinds, to flow from the common ownership of more than one media outlet in the same city. Sure enough, there is a good deal of published, reliable evidence that this hap-

pens. Again, the examples I shall cite are not the fruit of any comprehensive search, but simply ones that have come to my attention. I would repeat also that there are strong reasons for inferring that harmful effects of local-media cross-ownership often occur without coming to light in any published form, and hence that what we have here is only a fraction of what exists. I would further note that many of these examples shed light not only on the existence of such harmful effects, but also on the policy advantages or disadvantages of one of the "options for federal action" that Rand reviews. This is the option—the necessarily prevailing option if a divestiture rule is not adopted—of leaving the FCC to deal with "abuses" of cross-ownership on a case-by-case basis, and thus relying on a government agency to investigate and adjudicate (with valuable licenses hanging in the balance) the kinds of journalistic facts reported in these examples.

1) *Litwin's results on Spokane.* Rand discounts the results of the two studies involving Zanesville, Ohio, both of which found harmful effects from the media monopoly there, on the basis that "this result cannot simply be extrapolated to all other media monopolies; the policy question is whether there is a general tendency for media monopolists to provide poorer service. Additional evidence from other cities is needed to answer that question." "Options" report, at 10. Again, "... Zanesville may illustrate a specific, isolated problem. Additional survey research would be needed to extend these results to other media monopoly communities...." "Current knowledge" report, at 148. Additional evidence and survey research on another city is that concerning Spokane, Washington, which is found in the Litwin-Wroth study commissioned by the National Association of Broadcasters and filed by it with the FCC in the cross-owner-

ship proceeding, Docket No. 18110. George H. Litwin and William H. Wroth, *The Effects of Common Ownership on Media Content and Influence: A Research Evaluation of Media Ownership and the Public Interest*, July 1969. Rand discusses this study at some length (*e.g.*, "current knowledge" report, at 134-136), and notes that it has been deservedly criticized (by me and the FCC) for, among other things, tending "to discount the very negative attitude toward the cross-owned media found in one of the three concentrated markets . . ." *Id.* at 135. While Rand says nothing more about it, I find it hard to see why that "very negative attitude" found by Litwin and Wroth through their professionally-conducted in-depth interviews of 13 "media personnel" and some 10 "business and community leaders" in Spokane is not "evidence," produced in fact by "survey research," on the performance of the media cross-ownership in that city. (See the Litwin Study at 4-4—4-5 and Appendices B, C, and D on the number of persons interviewed, their selection, and the questions asked.) Litwin wrote as an Assistant Professor of Organizational Behavior at the Harvard Business School, with a Ph.D. in Social Psychology from Harvard; Wroth was research director of Intermedia Systems Corporation, with academic credentials and extensive experience in survey research (see *id.*, Appendix E). They conducted their interviews in six cities, selected to comprise two large ones, two medium-sized, and two small (about 300,000 population), with each pair matching a city with a relatively high concentration of common media ownership against an otherwise similar city with a relatively low concentration. (See *id.* at 4-1—4-3 and Appendix A for data on the selected cities.) The small city with the high concentration was Spokane (which the study calls "Carterville"). Litwin and Wroth were working under commission from the NAB, and their discussion of their results is, as Rand indicates, slanted to discount findings unfavorable to cross-ownership. The selection of their interview subjects also had a bias that quite possibly favored cross-ownership. See "current knowledge" report, at 135; Barnett, 22 *Stanford Law Review* at 265-266. It therefore would seem all the more significant that Litwin and Wroth obtained such negative results from their interviewees concerning the media cross-ownership in one of the three "highly concentrated" cities, and the only such "small" city, that they studied.

In Spokane the "Carter" family owns the city's only two daily newspapers, the most successful of its three television stations, and AM and FM stations as well. Litwin and Wroth found from their interviews "a good deal of discontent . . . with Carter policies and power over the community," including allegations that:

> Carter newspapers, lacking print competition, are known for their lack of quality, their total dependence on wire services, and poor coverage of news. It was alleged, further, that the Carter TV station uses the nwspapers' stories practically verbatim and actively reviews and censors network news. One respondent called the two Carter newspapers "the two dullest, most inaccurate newspapers in the country."
>
> The Carters cross-promote their outlets very heavily—and give little or no publicity in the newspapers to the competing media—publishing incomplete listings and omitting references to important local TV documentaries.
>
> Both newspapers and TV are alleged to have avoided or white-washed local scandals, controversies, or problems. It was stated that the TV station avoids any kind

of public service broadcasting that would uncover the real problems in the city.

> Apparently (this from friends and critics alike), the Carters consider television strictly as an entertainment medium and make little effort to inform or enlighten the public as to the major problems and controversies in their community. One respondent told us that the Carters "tend to use their media to support causes which aid or beautify their holdings rather than the community at large." [See Litwin Study at 7-5—7-7.]

Litwin and Wroth thus concluded that "the Carter family media combinations come close to fulfilling the criteria set forth earlier for common ownership detrimental to the public interest. . . . From all the evidence we have assembled in Carterville, it appears likely that the Carter family may not be using its tremendous resources in the spirit of public service. . . . [T]here is definitely some question as to the value to the community of their common ownership of several major media outlets." *Id.* at 7-7—7-8.

2) *The Chronicle case.* The recent FCC license-renewal proceeding in the case of *Chronicle Broadcasting Co.*, involving the San Francisco Chronicle and its San Francisco TV station, KRON-TV, is peculiarly pertinent because it is the only case in which the FCC has conducted a full-dress hearing into allegations of harmful effects on news content arising from local media cross-ownership. (This does not mean, it should be noted, that it is the only case in which evidence of such effects has been presented to the FCC, much less the only case in which such evidence exists. For First Amendment reasons, the FCC takes the position that it will not inquire into alleged news manipulation unless presented with a special sort of evidence—"significant extrinsic evidence of deliberate distortion,"

such as "testimony of a station employee concerning his instructions from management," or documentary evidence of such instructions. *National Association of Theater Owners of Indiana*, 19 Pike & Fischer Radio Reg. 2d 799, 801 (1970); "*Hunger in America*," 20 F.C.C.2d 143, 150-151 (1969); *Democratic National Convention*, 16 F.C.C.2d 650, 657-658 (1969); *WMAL-TV*, 25 F.C.C.2d 705, 707 (1970). As has been noted, the shaping of the news to suit the interests of the media owner does not necessarily, or prudently, take the form of written memoranda or express instructions (especially not with acknowledgments of improper motive), but even when it does, station employees willing to produce such evidence and publicly accuse their employer before the FCC can be expected to be less than common.) In the *Chronicle* case, the FCC was presented by a disenchanted TV newsman with "extrinsic evidence" of news-management abuses, and it consequently held a lengthy hearing into such evidence on the station's renewal application. This resulted in an initial decision by the FCC's hearing examiner resolving all the issues in favor of the station and recommending renewal of the license, *Chronicle Broadcasting Co.*, 21 Pike & Fischer Radio Reg.2d 245 (1971), and in a 6-1 decision by the Commission upholding the examiner's findings and renewing the license. *Chronicle Broadcasting Co.*, 27 Pike & Fischer Radio Reg.2d 743 (1973). (The Commission agreed with and adopted all the findings and conclusions of the hearing examiner except for the few that it expressly modified. *Id.* at 761 (par. 41).)

Notwithstanding this result, the two opinions contain extensive findings of fact by the FCC and its hearing examiner that cannot be ignored, one would have thought, in a thorough search for evidence as to the exist-

ence of harmful effects from local-media cross-ownership. One would also have thought the case warranted attention for the unique light it throws on the desirability of leaving the FCC to deal with alleged abuses of media cross-ownership on a case-by-case basis, inasmuch as it offers the only available illustration of that approach. (So far as published sources are concerned, in addition to the FCC decisions themselves the *Chronicle* case has been discussed in two articles of mine, "Merger, Monopoly & A Free Press," *The Nation*, January 15, 1973, at 76, 82-86; and "The FCC's Nonbattle Against Media Monopoly," *Columbia Journalism Review*, January/February 1973, at 43.)

The pertinent evidence provided by the *Chronicle* case—all in the form of adjudicated findings of fact made by the hearing examiner and upheld by the FCC—is extensive, and only several of the most significant findings will be listed and discussed here:

a) The Chronicle Publishing Co., publisher of the morning and Sunday *Chronicle*, had signed in October 1964 a joint-operating agreement with San Francisco's other daily-newspaper publisher, the Hearst Corporation, which then published both the morning *Examiner* and the afternoon *News-Call Bulletin*, as well as a Sunday *Examiner*. The agreement provided for elimination of the *News-Call Bulletin*, for joint publication of the *Chronicle* in the morning, the *Examiner* in the afternoon, and a single combined paper on Sunday, and for a 50-50 split between the two publishers of the profits from all three papers. See the initial decision, 21 RR 2d at 261, 283 (pars. 40, 135). The agreement "was treated by its signatories as confidential until such time as it could be effectuated." *Id.* at 283 (par. 135). In September 1965, as the two publishers were about to put the agreement into

effect (which they did, with a public announcement, on September 10), news of the impending event began to break on other media outlets. Two TV stations and various radio stations in San Francisco covered the story, reporting "such things as meetings of unions which might be affected, and alterations on the physical plants of the newspapers involved." *Id.* at 283 and n. 52 (par. 135). But, with the single exception that on September 5 "the Chronicle published a reference to it [the impending merger] based on a story from the New York Times wire service" (*id.* at 283, par. 135), not one of San Francisco's three daily newspapers published anything on the story prior to the publishers' announcement of the *fait accompli* on September 10. *Ibid.*

The FCC further found that the Chronicle's TV station, KRON-TV, likewise refrained from covering the story prior to the publishers' announcement. Moreover, by virtue of its probe into the news process, the FCC was able to determine how this came about: the station was ordered to keep silent by its chief executive after he had discussed the subject with his boss, the publisher of the newspaper. The findings state that, parallel with the silence of the newspaper, "no mention of the matter was made on KRON-TV" (*id.* at 283, par. 135), and they continue:

> KRON's lack of coverage was not attributable to any unawareness on the part of its newsmen. All were familiar with the events which had excited the attention of their competitors, and many of them importuned their superiors for permission to cover the story. Their requests were refused with the explanation that the stories were rumors, not facts, and KRON would not broadcast the story until it had the facts. In practice this meant until the story had been confirmed by

the top management of one of the affected newspapers. [*Id.* at 283 (par. 136.]

The FCC specifically found that Mr. See, chief executive of the station and vice president of the Chronicle Publishing Company, had been consulted on the problem by the station's news executives. See thereupon "called Mr. Thieriot [president of the company and publisher of the newspaper] to ascertain the validity of the rumors." *Id.* at 284 (par. 138). "[B]ut Thieriot refused to comment. Whereupon See issued the instructions which blocked the KRON newsmen from broadcasting the story until the newspapers issued a statement on the matter." *Ibid.*

Such are the findings of fact. They establish that all three of the city's newspapers ignored an important local story whose coverage at that time could have harmed the interests of their owners, and further that the cross-owned TV station—on orders from its chief executive after he had conferred with his boss the newspaper publisher—simultaneously blocked its news staff from covering the story until the publishers made their announcement. Thus, just as one would expect, the cross-ownership had the effect of enlarging the impact of the self-interested noncoverage by the newspapers—which, as usual, were the only daily papers in town—to encompass the cross-owned TV station as well.

No less pertinent is the policy judgment expressed by the FCC and its hearing examiner in interpreting these facts. The examiner found, and the FCC agreed, "that KRON's actions during this period represent a reasonable reaction to a unique and delicate situation, rather than an attempt to suppress news." *Id.* at 284 (par. 140). While "obviously a local newspaper merger was highly newsworthy," KRON's "connection with Chronicle was known, and any comment it made would be publicly

regarded as based on 'inside' information"; since the station actually had no inside information, the public would have been misled, and "in such a situation, where neither course was free of hazards, See acted in a reasonable manner." *Id.* at 284 (par. 140), 306 (par. 257).

The FCC's policy judgment, then, is that in such situations the cross-media tie inevitably harms the public's interest in the news. Whichever course the station took, its audience would have suffered—either through not hearing about a "highly newsworthy" story, or through being misled into thinking it was getting "inside information" when it was not. Nor was this situation unique to the 1965 newspaper merger in San Francisco. The same dilemma and the same policy judgment apply to any of the frequently recurring cases in which a broadcast station must deal with a potential news story involving a commonly-owned newspaper (or other local media outlet), and, likewise, to the cases where a newspaper must deal with a story involving a commonly-owned local station. True, one may not accept the FCC's judgment that one outlet cannot cover a story involving its cross-owned sister with both the reality and the appearance of journalistic independence. But one is left in any event with the finding in the *Chronicle* case—the one case where the FCC has looked—that there was in fact no such independent coverage by the cross-owned station, that there was no coverage at all, and that this admittedly harmful effect on news content resulted directly from the cross-ownership tie.

(b) Also matters of undisputed proof in the *Chronicle* case were two memoranda issued to the KRON news staff. One, from the station's chief executive, stated that

> . . . stories relating to the "public relations image of any radio or television station in the 50 states and their

parent companies and/or networks or stories relating to the individual acts of officers, directors, or employees of the foregoing named organizations," should be brought to the attention of Messrs. See [the chief executive] or Constant [general manager] before being broadcast, or in their absence, Mr. Cothran [news director] should approve or disapprove the story.

The memo concluded by stating that it did not apply to any publishing company, "except, of course, the Chronicle Publishing Company." 21 RR 2d at 294 (par. 195). The second memo, from the news director, stated:

> You are all aware of company policy regarding the reporting of labor strife within the broadcast industry and/or local newspapers.
>
> However, it has become apparent that some of you do not understand the full intent of this policy.
>
> It is therefore mandatory that any story relating to broadcast industry labor problems and/or local newspaper problems be cleared with the News Director BEFORE airing.
>
> In case there is no contact possible with the News Director, the Program Manager or Production Manager should be contacted. If you cannot get clearance for some reason from the above then DO NOT RUN THE STORY. [*Id.* at 294-95 (par. 194).]

The hearing examiner and the FCC accepted the licensee's explanations that the chief executive issued the first memo "to promote accuracy in stories concerning that with which he was personally familiar," and that the news manager issued the second because he feared membership in the AFTRA union by some members of the KRON news staff "might affect their objectivity on stories relating to labor strife in broadcasting. Hence, he

regarded it as desirable that such stories be reviewed by persons unlikely to share the bias which he feared." *Id.* at 295 (pars. 196, 197). Although a newsman testified "that the existence of these memos resulted in self-censorship by newsmen," the examiner responded that "the record does not identify any story that was not covered, or that was covered differently, because these memos were extant." *Id.* at 295 (par. 198); see also 27 RR2d at 808.

These explanations and the FCC's acceptance of them notwithstanding, the memos are facts and it is not unreasonable to interpret them differently, to read them straightforwardly as evidencing management control of the news with respect to stories affecting the owner's interests. The newspaper-broadcast cross-ownership has an impact on both memos by expanding the scope of the stories affected—not just the "public relations image" of broadcasters, but of "the Chronicle Publishing Company" as well; not just "broadcast industry labor problems," but "local newspaper problems" as well. So if the memos are considered in any way undesirable, the cross-ownership necessarily expands their harmful impact. But this conclusion follows, at least with respect to the second memo, even if one accepts the explanation offered by the station and the FCC. Assuming that the memo was indeed designed to avoid news-staff bias on labor stories—and ignoring the obvious possibility of management bias the other way—it follows that the cross-ownership tie was harmful, since without it the alleged risk of staff bias would apply only to stories involving labor strife in broadcasting, and not in "local newspapers" as well.

(c) Several aspects of the *Chronicle* case provide significant evidence on the desirability of dealing with local-media cross-ownership through this kind of case-by-case examination of alleged abuses, evidence reflecting both

on the efficacy of this approach and on its possible affirmative disadvantages. The following examples relate to the efficacy question.

Several incidents in the case involved alleged news manipulation arising out of Chronicle's interest in cable-TV franchises in communities served by the TV station. At a time when Chronicle was competing for the franchise in South San Francisco, for example, KRON newsmen were told in a memo from the news director: "Between now and the first of February, let us concentrate a little heavier on *South* San Francisco—if warranted. HPS want to make those people happy." ("HPS" was Harold P. See, president of KRON and also of the Chronicle-owned cable-TV company.) 21 RR2d at 279 (par. 117). A follow-up memo ordered coverage of a library dedication in South San Francisco and added: "HPS wants to make sure that the mayor of South SF is prominent in any film we do!" *Id.* at 280 (par. 121). When the film taken was ruined in the lab, See wrote a letter of explanation to the mayor of South San Francisco; he admitted the letter "was motivated by CATV considerations," but denied the coverage was. *Id.* at 281-282 (pars. 124, 125). Weighing this evidence, the hearing examiner—who stated that "adverse conclusions under this issue are to be reached only if KRON's improper motives have been established by the most clear, convincing and unambiguous evidence," *id.* at 305 (par. 253)—found that the concern about the mayor demonstrated "an unusual interest in a political figure" on See's part (*id.* at 282, par. 129), but did not prove the TV coverage was motivated by the CATV interest. Both See and the station's news director denied such a motive, "and there is no direct evidence in contradiction. While such an intention might be inferred from [the second]

memo, the inference could only be based on a conjectural choice of possible motives for See's interest in South San Francisco. If KRON is to be convicted on circumstantial evidence, the circumstances should be considerably less ambiguous." *Id.* at 282, par. 128.

Another example: In both the foregoing incident and one other in which the KRON president had ordered unusual news coverage to coincide with Chronicle's application for a cable franchise in the community involved, several KRON newsmen testified that they asked the news director the reason for the coverage and he "responded that the coverage was relative to the seeking of a CATV franchise in that area." *Id.* at 277 (par. 106), 279 (par. 118). The examiner and the FCC held this evidence to be "without probative weight," because the news director and other such "middle management personnel" were not involved in the cable operations of the owner and thus "there is no presumption that their statements in this area are based on actual knowledge" (of the motive). *Id.* at 277 (par. 107). The examiner explained: "If, in fact, KRON programming was being used to advance Chronicle's business interests, it would have been necessary to issue appropriate orders to these people, but it would have been neither necessary nor natural to have informed them of the motives for such orders." *Ibid.*

These and other examples (discussed more fully in my article in *The Nation*, cited above) would seem to fuel substantial doubts as to whether the FCC, by employing the case-by-case approach, can in fact protect the public against abuses of local-media cross-ownership that involve manipulation of the news. Even when all the other evidentiary hurdles are overcome and the FCC holds a full hearing into such allegations, the *Chronicle* decision appears to establish, among other things, that improper

conduct in this area cannot be proven unless the media owner or its top executives, when they "issue appropriate orders" for news decisions designed to advance the owner's business interests, are imprudent enough to do what is "neither necessary nor natural" and declare their improper motives. (Even when they do the case may not be proved, for the FCC is then likely to confront—as happened in two other instances in the *Chronicle* case—a conflict of credibility between the executive and the newsman who claims to have heard the statement. See *The Nation*, January 15, 1973, at 85.)

d) Lastly, the *Chronicle* case also involved an instance of alleged distortion of *newspaper* content to protect the owner's TV interest. The FCC in its hearing order had cited an allegation that a Chronicle column by Charles McCabe "had been censored because the article urged 'citizens to contact the FCC about violence on television.'" 17 F.C.C.2d 245; *The Nation*, Jan. 15, 1973, at 85. At the hearing McCabe testified to the effect that this was true. *Id.* at 85-86. However, the examiner struck his testimony from the record on the ground that inquiry into what a newspaper prints would be inconsistent with the First Amendment, *id.* at 86, and the FCC agreed (citing other grounds as well). 27 RR2d at 823.

This ruling may well have been correct. Still, one may think McCabe's testimony stands as evidence of a harmful effect of media cross-ownership, in that the public was denied a newspaper column that apparently would have been printed if the newspaper owner had not had an interest in protecting local broadcast licenses. More important, however, are the implications for the case-by-case approach. The ruling suggests that insofar as abuses of local-media cross-ownership may involve distortion of the newspaper's content—such as suppression of stories em-

barrassing to the cross-owned station—these cannot be examined through the case-by-case approach, lest the First Amendment be offended. This would be a substantial impediment to the FCC's ability to protect the public from such abuses (the more so since records of the *broadcast* content are usually not available)—protection which, if divestiture is not required, will be the only safeguard the public has. On the other hand, if the FCC did deal thoroughly with serious allegations involving newspaper content, the disadvantages of such a government inquiry into what a newspaper prints or does not print, and why, are real and substantial. More broadly, the FCC proceeding in the *Chronicle* case consisted largely of just such an inquiry into the content, underlying decisions, and motives of *broadcast* news. If that kind of proceeding also carries policy disadvantages—if broadcast journalism is not so different from newspaper journalism so far as the policies of the First Amendment are concerned—then the fact that such an inquiry flows inevitably from the case-by-case approach—and becomes the only recourse if divestiture is rejected—would also seem worthy of notice in evaluating for policy-makers the "options for federal action" on local-media cross-ownership.

3) *The New Republic on Topeka.* Another case study of a "small" city where the only daily newspapers are under common ownership with a TV-AM-FM combination, comparable to Litwin's study of Spokane but conducted by a journalist, was carried out recently by Walter Pincus, executive editor of *The New Republic*, and produced findings remarkably similar to Litwin's on Spokane. See "Quality News: What Difference Does Ownership Make?," *The New Republic*, May 18, 1974, at 15. Pincus studied Topeka, Kansas, where the Stauffer chain owns the only newspapers, the only commercial VHF

station (there is an educational VHF and a commercial UHF), and an AM and FM station. He found, among other things, that the senior Stauffer, Oscar, "has seen journalism primarily as a money making venture . . . [and] that view is reflected today in the way his Topeka properties are run." *Id.* at 15-16.

> Staff members of the Topeka newspapers cannot recall a "crusade" in recent years other than promotions for charities. Investigative reporting is not encouraged and sometimes discouraged. One reporter covers the entire Kansas state government for both newspapers. The same is true for all the major county and city beats, such as the courthouse and city hall. . . .
>
> . . . The Stauffers have been active city boosters. Oscar's son Stanley, now president of the company, sits on the board of directors of the First National Bank of Topeka. Stories critical of the city and its future have a hard time getting into print. A troublesome urban renewal project in which the First National Bank has a financial interest has been given kid gloves treatment by the newspaper. When the city government was first approached about giving out a cable television franchise, the Stauffer participation in one CATV company was initially hidden and only disclosed publicly when one of the city's other radio stations broke the story. Stauffer thereafter withdrew. When campaign contributions to city commissioners from one cable TV company seeking the franchise turned up—checks which passed through the First National Bank—the story was held back by the newspaper until it broke on a radio station. The CATV franchise was finally awarded in 1971. The general counsel for Stauffer turns out to be a stockholder and principal figure in the winning company.
>
> . . . .

> What's it like to compete with Stauffer? The only people who do that are KTSB-TV, a relatively new UHF station, and a handful of Topeka radio stations most of which stick to music formats with "rip and read" news programming. With only three newsmen and one sound camera, the UHF station has its hands full. Many news sources deal only with the Stauffer outlets. . . .
>
> . . . .
>
> Staff members recognize the limitations under which they operate at Stauffer's newspaper and broadcast stations. "The monopoly discourages reporting," one newsman says. There are several cases where reporters have quit after being discouraged from venturing into controversial areas. . . . [*Id.* at 16.]

These findings, based on on-the-scene interviews by a respected journalist, would seem to be evidence of harmful effects from the media cross-ownership in Topeka. Pincus goes on, however, to express the view that the situation would not necessarily be improved by breaking up Stauffer's newspaper-broadcast cross-ownership, and it is therefore necessary to examine not only his findings but his opinions as well. Pincus reports one opinion in Topeka "that the competitive news situation would improve no matter who the new owner was"; a second that the journalists in town have " 'considerable pride' " and " 'would follow along' if a new, more aggressive kind of news gathering took hold," either "in any station news department or in the Stauffer paper itself"; and a third that " 'There is no guarantee things would be better. It would all depend on who is on the other channel. They do a better job now [than the UHF] because of the size of [the Stauffer] company.' " *Ibid.* (Pincus's brackets.) It is the third opinion with which Pincus agrees, explaining

that "Size and owner attitude play a key role in what a news organization can do. . . ." *Id.* at 16-17. He accordingly concludes that "Divestiture as promoted by the Justice Department will not in itself assure a better served public." *Id.* at 17.

This conclusion seems irrelevant to the policy issue. Even assuming that the burden of proof rests on those who favor diversity of control rather than those who favor concentration—an assumption contrary to existing law and policy—the issue is not whether diversity will "in itself assure a better served public," or will offer "any guarantee of better public service" (*id.* at 17). There is no way to assure or guarantee that a new owner produced by divestiture in a given case will not be "worse" than the existing owner. The issue is whether, over the many different cities, different media outlets, and different "owner attitudes" involved in cross-ownerships throughout the country, separate control of newspaper and broadcast facilities within each city is *likely* to produce better public service than common control. On this issue—the effect of ownership structure, other things being equal—the weight of Pincus's evidence on Topeka is clear, and it is the evidence that matters.

First, it should be noted that Pincus's study produced no finding of any *benefit* from the newspaper-broadcast cross-ownership in Topeka. The only suggestion of one lies in his apparent adoption of the opinion that the Stauffers with their TV station "do a better job now [than the UHF] because of the size of [the Stauffer] company." But VHF's are always dominant when they compete with UHF's; it is no surprise that the city's only V, whoever owns it, will have much higher ratings, greater resources, and hence more local news coverage than a "relatively new" U. Pincus writes that the Stauffer TV

station's "news dominance derives in part from its special advantage within a larger communications complex" (at 16), but since he immediately adds: "Kept strictly separate from the news operation of the newspaper—to avoid the appearance of monopoly—the station news personnel work for both the radio and television outlets" (*ibid.*), it is clear that he is talking only about the TV-radio complex, not the newspaper-broadcast one.

Otherwise, all of Pincus's findings on Topeka indicate that the public is indeed harmed by the newspaper-broadcast cross-ownership and would almost certainly benefit from its break-up. Given the complacent, apathetic journalism practiced by the Stauffers on all their media outlets in Topeka (much like the "Carters" in Spokane), one may well think that in this case, so far as "owner attitude" is concerned, a new owner of the TV station (or the newspapers) could hardly be "worse" and stands a good chance of being "better" (a result which, as a dividend, might well improve the competing Stauffer media as well). But in any event—and this point applies to all cross-ownership situations—the new owner would at least be *different* from Stauffer, and this would at least mean that the particular interests and attitudes of the Stauffers would no longer govern both the newspapers *and* the TV station. The public could hardly help benefiting. Thus, if Stanley Stauffer sits on the board of the First National Bank and "a troublesome urban renewal project" involving the bank "has been given kid gloves treatment by the newspaper," the TV station under non-Stauffer ownership would be free to report that story without kid gloves (as the TV station in Wichita, Kansas, has done with the story conerning the newspaper, the art museum, and the *Fourth* National Bank, see p. 19 supra). If the Stauffer participation in the CATV company was

only disclosed "when one of the city's other radio stations broke the story," and if the same thing happened with the story involving campaign contributions from the other cable company that passed through the First National Bank, separate ownership would free the television station to break such stories (as well as others that now may not get broken at all, because the other radio stations don't do it). Further, break-up of the newspaper-TV combination could be expected to help the other news media in town by ending the situation (also found by Litwin in Spokane) whereby "many news sources deal only with the Stauffer outlets."

Pincus also studied two other cities—Cheyenne and Casper, Wyoming—and here again the facts he found are pertinent, though they do not necessarily accord with his conclusions. In Cheyenne, where the McCraken interests sold the city's only TV station three years ago (under pressure from the Justice Department and the FCC) but still hold the only newspaper, an AM and FM station, and the cable-television franchise, Pincus reports that the papers are still unaggressive, that the TV station (now owned by a small broadcast chain based in Pennsylvania) struggles with limited resources, and that "almost everyone" he talked to agreed that "as far as the public can tell, things have not changed a bit." *Id.* at 17. Yet the *facts* Pincus reports on Cheyenne show that things are indeed better since the divestiture, if only in small ways, and do not in any respect suggest that they are worse. The new TV owner has "increased the station's news staff from three to five, sent a man to cinematography school and turned over the sound camera to the news department" (instead of the sales department). The new owner has also added a noontime news show and the shooting of news in color (hard to believe the public doesn't notice

this), using "almost six times more footage than before." *Ibid.* Meanwhile the McCraken radio station "was forced to hire one full-time newsman," where before it had none since its announcers "used the TV copy." *Ibid.* (Thus, contrary to the suggestion about Topeka, the TV station in Cheyenne has *expanded* its news facilities after separation from the newspaper and the radio stations, while the newspaper-radio complex has expanded its own facilities by adding the radio newsman.)

Finally, Pincus finds an "interesting comparison" in Casper, Wyoming—which he apparently did not visit—where "two aggressive, opinionated men run the competing newspaper and television stations," and "their clash" has produced better coverage of the Cheyenne statehouse than the Cheyenne media provide. "The generally higher quality of the Casper media is credited to the personalities and ambitions of the individuals at the top," Pincus reports (*id.* at 17). That may be, but it may also be that the journalistic competition between the newspaper and TV station had something to do with the fact that they are separately owned. It is hard to believe—and Pincus offers no basis for believing—that such competition would be equally likely if one of those "two aggressive, opinionated men" controlled both media outlets, or if they both worked for the same boss.

4) *The New York Times on Columbus; the Wall Street Journal on Bluefield.* Two other soundings by the national press into the effects of "media concentration" at the local level were made by the New York Times in 1970 and the Wall Street Journal in 1974. The Times article, particularly interesting because its attention to this subject was unplanned, dealt with a campaign for Congress in Columbus, Ohio. "Liberal Underdog Wages Frustrating Campaign for House in Columbus," by Steven

V. Roberts, New York Times, October 12, 1970, p. 20, cols. 3-8. The article reports the difficulties being encountered by James Goodrich, a Democrat running against an incumbent Republican, which include:

> The media are another obstacle. The Columbus Dispatch is owned by the Wolfe family, which does little to hide its Republican preferences. The Wolfes also own one of the three television stations in Columbus. A second is owned by the Taft family. The second newspaper is owned by Scripps-Howard, which is also Republican-oriented.
>
> The Goodrich campaign has thus received little press coverage. When Sargent Shriver came to town to raise money for the candidate, his press aide, Adrienne Bosworth, got in touch with The Dispatch.
>
> "The reporter told me, 'You're the wrong political party,' " Mrs. Bosworth said.
>
> Mr. Jordan [political editor of the Dispatch] concedes that the Goodrich campaign has gotten little attention. But the reason, he said, is that many of the Goodrich releases are "patently juvenile."
>
> To get his name more widely known, Mr. Goodrich purchased a series of television spots, but these had to be dropped when the money ran out. One reason was that without advance publicity, the Shriver meeting drew only 750 persons to a hall that seated 3,000.

It is possible, of course, that divestiture by the Wolfes of their newspaper or broadcast holdings in Columbus would produce a new owner just as blatantly Republican-oriented, just as unwilling to give news coverage to a Democratic congressional candidate, as the Wolfes and Scripps-Howard. It is also at least possible, however, that divestiture would produce a new owner for the Wolfes'

newspaper—or their TV station, or their AM or FM station—who would give Columbus more of the journalistic diversity it appears to need. The public would be unlikely to suffer from the change, and likely to benefit.

Another such slice of life was provided by the recent article in the Wall Street Journal on Bluefield, West Virginia ("Single Control of TV, Newspaper in One City Faces Increasing Fire," by Karen J. Elliott, July 23, 1974, page 1, col. 1). Although the reporter expresses no conclusions of her own, she reports facts and complaints about the performance of the media in Bluefield, where the Shott family owns the gas supply company, the paper supply company, the commercial printing plant, stock in both major banks, and the only newspaper, only TV, only FM, and the more powerful of the two AM stations. Among other things, ads in the Bluefield paper cost more to Bluefield merchants than to merchants in a nearby town; "blacks, miners and persons out of grace with the Shotts . . . complain that they get unflattering news coverage or none at all"; the cross-owned paper and stations allegedly "fail to reflect the fact that coal miners' black-lung disease is a serious concern among many in Bluefield," while "there is a weekly page in the newspaper reporting favorably on developments in the coal industry, and the paper annually prints a coal-industry supplement full of ads from mine operators"; when Julian Bond was scheduled to speak in Bluefield, "the Daily Telegraph gave the wrong date—a day late"; the Bluefield mayor, a close friend and alleged "yes man" of the Shotts, "not only appears on television six nights a week broadcasting sports but also often gets his picture in the Telegraph"; even a defender of the Shotts, who calls them "benevolent tyrants," notes that "The real danger here is the conflict of interest" arising out of their "financial involvement" in so many local enterprises (including city

hall through employment of the mayor); and Ned Shott himself, in answer to the criticism, says, "People around here just don't want to hear any other point of view." *Id.* at 22.

5) *Portland, Oregon.* Reminiscent of the *Chronicle* case is the way the two daily newspapers in Portland, Oregon, both owned by S. I. Newhouse, reported in 1971 the story of Newhouse's effort to purchase all the stock (it already owned 50 percent) of Mount Hood Radio and Television Broadcasting Corp., licensee of stations KOIN TV, AM, and FM in Portland. Newhouse agreed to purchase the stock, and applied to the FCC for approval, in January 1971. On October 1, 1971, the FCC announced its approval, over dissenting opinions by Commissioners H. Rex Lee and Nicholas Johnson. (Broadcast Action, Report No. 10163, October 1, 1971.) The latter wrote that the decision allowed Newhouse "to achieve an unhealthy degree of control over the minds of citizens of the Portland area by reason of their total ownership of a high-rating AM station, a high-rating TV station, an FM station, and two daily newspapers," and that "This kind of media domination is . . . the kind of situation the Department of Justice has traditionally and vigorously opposed—and opposes in this case." The Justice Department thereupon sent Newhouse and the other parties a letter stating that it planned to bring an antitrust action challenging the proposed transaction, and on October 13 Newhouse decided, as a result, not to consummate the acquisition. On December 3, 1971, Newhouse announced this decision. See "Newhouse Drops Deal on KOIN," Oregon Journal, Dec. 3, 1971; "Plan to Buy KOIN Halted by Newhouse," Portland Oregonian, Dec. 4, 1971.

The way these events were covered by the two Newhouse dailies in Portland, the *Oregon Journal* and the

Oregonian, was in turn covered by two other publications, the Vancouver *Columbian*, a daily newspaper in nearby Vancouver, Washington, and the *Oregon Times*, a monthly "alternative" paper in Portland. An article from the *Columbian* for December 9, 1971 ("Monopoly on News") reports:

> In the 11 months since Newhouse announced he would buy the stations, the news columns of the Portland papers have carried little information about the plans. The first stories last January indicated that Newhouse was buying the stations, subject to FCC approval. [One of these stories was "Newhouse Gains Control of KOIN Radio, TV Firm," the Oregonian, January 5, 1971.] In October, when the FCC voted 4-2 for approval, the Oregonian and Journal reported briefly and simply that the application had been approved. No mention was made of the split vote.
>
> A short time later, when the dissenting opinions of Commissioners Nicholas Johnson and H. Rex Lee became available, the Portland papers ignored them completely.
>
> A Columbian news story at the time reported [the content of the Johnson and Lee dissents] . . .
>
> Nothing further of the case was heard until last Wednesday when a monthly Portland publication, the Oregon Times, announced it was petitioning the FCC to reverse the KOIN decision . . . .
>
> The Times' action was not mentioned in the Journal until Friday and the Oregonian until Saturday, when the two papers reported the Newhouse announcement that the KOIN deal was off. Both Journal and Oregonian, quoting no one in particular, carefully pointed out that Newhouse stockholders had been told as far back

as Oct. 13 that the company was not going to buy KOIN because of Justice Department opposition. Neither newspaper explained why the first public announcement of that decision had been delayed until Dec. 3.

The Friday and Saturday stories reported that Newhouse had been advised by letter from the Justice Department that it planned to bring an antitrust action challenging the proposed transaction. That was the first that Newhouse readers knew that any officials of the government had questioned the sale.

Both Journal and Oregonian stories also reported for the first time that the FCC decision had been split and that Johnson and Lee had dissented. The contents of their dissents were not mentioned. The stories also provided the first information that the Oregon Times had sought a reversal of the FCC decision . . . .

The two articles from the Newhouse papers for December 3 and 4, 1971, appear to confirm this account. "Newhouse Drops Deal on KOIN," Oregon Journal, December 3, 1971; "Plan to Buy KOIN Halted by Newhouse," Portland Oregonian, December 4, 1971. Both state that Newhouse announced "Friday" that it had decided on October 13 not to consummate the transaction because of objections raised by the Justice Department (neither paper attempts to explain the delay); that Justice had opposed FCC approval of the transaction; that Commissioners Johnson and Lee dissented from the FCC decision (neither paper mentions the contents of the dissents); that Justice had sent Newhouse a letter threatening to sue to block the transaction ("It was after the Department of Justice letter that Newhouse Broadcasting decided not to go ahead with the purchase although public announcement of the decision was not made until Friday"); that

the Oregon Times had petitioned the FCC "this week" to revoke its approval of the sale, but that Newhouse "already had notified stockholders and the Justice Department of its decision to withdraw from the sale"; and so forth. I have found no indication that either paper had previously reported any of these facts, including the matters of public record such as the FCC dissents and the Justice Department opposition.

The story was also told in the *Oregon Times* for December 1, 1971, just prior to the public announcement by Newhouse, in part as follows:

> In Oregon, the Newhouse pattern of media concentration has had harmful effects on the quality—and the reliability—of local journalism.
>
> . . . .
>
> On October 1, after a long delay, the FCC gave its consent. The vote was not unanimous, and two of the seven commissioners filed strongly worded dissents, objecting to the increased monopolization of Portland media the stock transfer would mean. Of course, this was not discussed in the local Newhouse papers. It was not even mentioned.
>
> . . . .
>
> When the Justice Department heard about the proposed transaction, it sent a letter warning that if the purchase went ahead, it would prosecute Newhouse for a violation of the antitrust laws. The Oregon Times has not been able to get a copy of the letter, but the Justice Department has acknowledged that it sent such a letter.
>
> We know that editors at both local Newhouse papers are aware of the letter. In fact, the Justice Department

warning is common knowledge at both papers and Channel 16. Despite this, in an obvious attempt to save the Newhouse management from embarrassment, they have said nothing about these developments. There has been an absolute news black-out on the subject . . . .

6) *San Francisco*. In several articles and Congressional testimony, I have documented the effect of the newspaper-broadcast cross-ownership in San Francisco in keeping out of the newspapers, or burying therein, important stories involving the broadcast station:

a) In my statement at the House hearings on the Newspaper Preservation Act (*Hearings Before the Antitrust Subcommittee of the House Judiciary Committee*, Sept. 24, 1969, at 261-265), I reported that the FCC decision ordering a renewal hearing on the licenses of stations KRON-TV and KRON-FM, owned by the San Francisco Chronicle, was reported in the Chronicle by running the AP dispatch on page 47, and in the jointly-operated Examiner by running six paragraphs two days late at the bottom of page 4 (*id*. at 261-62); that the Chronicle did not report for more than a month (and the Examiner never did) the public admission to a Senate Subcommittee by the Chronicle's publisher that his company had been responsible for hiring private detectives who tailed, staked out, and pried into the private lives (in a way the FCC subsequently found improper) of the two San Francisco-area residents whose complaint to the FCC triggered the renewal hearing (though the Chronicle had earlier reported the publisher's statement that he did "not feel justified in commenting further on these allegations") (*id*. at 263); that neither paper reported an FCC motion filed by the Chronicle to disqualify FCC Commissioner Nicholas Johnson from the renewal case (*id*. at 264); and that they ignored or played down other newsworthy aspects of the controversy over the TV license.

b) I told essentially the same story in an article, "Media Monopoly," in *San Francisco Magazine*, October 1969, at 32, 58-65.

c) In another article, "A KRONic Case," *San Francisco Magazine*, April 1973, at 39-40, I recited further developments in the FCC renewal proceeding on KRON-TV—appeal of the hearing examiner's report to the full Commission, a renewed attempt to disquality Commissioner Johnson, a challenged failure to file a new license application for the next three-year period—that had not been reported in the Chronicle. *Id*. at 40.

d) In "The Colossus of Mt. Sutro," *San Francisco Magazine*, May 1973, at 26, I reported on how the newspaper-broadcast complex in San Francisco kept the public ignorant about construction of a high TV tower (the tallest structure ever built in San Francisco) on a wooded hill in the center of the city until it was too late to stop it. The tower is jointly owned by the city's four VHF TV stations (and used by the others), and the four owners admittedly entered a "gentlemen's agreement" against publicity for the project (*id*. at 30), an agreement that one of their employees, the director of engineering for the tower, admittedly invoked (according to this court affidavit) in telling a news crew from the local public TV station that they were not supposed to report the construction—"There's an agreement between the stations not to cover it." *Id*. at 62. The four stations accordingly did not air the story (at least they were unable in court to produce any evidence that they had) during the period from May 1966, when the project was approved by the city's board of supervisors (whose majority voted against it, but not by a sufficient margin to kill it), to August 1971, when the tower began to rise (even though the public TV station had gone ahead and aired the story six

months before, when clearing of the site began). *Id.* at 30. And, thanks to the newspaper-broadcast cross-ownership, the story was similarly suppressed in both of San Francisco's daily newspapers, with only a few minor exceptions, during the same period of more than five years. (The exceptions were a 1967 article in the Sunday magazine and one story in each paper reporting the final approval of the tower project by the city planning commission in September 1970, the Chronicle's story consisting of three sentences at the bottom of page 15. *Id.* at 28, 30, 62.) This story which all the city's TV stations were interested in seeing not covered thus *was* not covered, either by them or by the cross-owned newspaper or its joint-operating partner, during a lengthy period when strong public opposition to the project would almost certainly have arisen if the public had known about it, as in fact it subsequently did arise when the tower was too far built to be stopped. (These facts, including in particular the amount of TV and newspaper coverage and the agreement among the TV stations, were reported in my article on the basis of statements made in court by the stations or their representatives.)

7) *Salt Lake City.* At the Senate hearings on the Failing Newspaper Act (part 1, at 328-369), John J. Flynn, professor of law at the University of Utah, in the course of detailed testimony about the structure and effects of the concentrated media control in Salt Lake City, testified to a significant instance of news suppression by that city's jointly-operated dailies, whose ownership interlocks with that of several TV and radio stations in the same market. The story involved a $17-million bond issue on the Salt Lake City ballot in November 1963 for construction of a civic auditorium complex. "Both newspapers strongly supported the bond issue and actively campaigned in their editorial pages and news stories for a favorable public vote." *Id.* at 361. Their owners had a private interest in seeing the bond issue approved, Flynn stated, inasmuch as "several parcels of land in the area designated for the civic auditorium are owned by the Mormon Church [owner of one of the newspapers, two local TV stations, a powerful AM and an FM] and the area is adjacent to the temple grounds of the Mormon Church," thereby promising an economic benefit from the development of church-owned land and a further benefit from use of the proposed auditorium for overflow crowds attending major church functions at the temple—both of which benefits were realized, Flynn said, in lease arrangements for the church-owned land that followed approval of the bond issue. *Id.* at 362. The owners of the other Salt Lake City newspaper (and of a 35 percent interest in another local TV station), plus an ownership interlock with the only newspaper in nearby Ogden and another major radio station in Salt Lake City, also had an economic interest in passage of the bond issue, Flynn said, through major land holdings in downtown Salt Lake City. *Id.* at 362-364. While "many voters assumed that the auditorium complex would be used . . . by the University of Utah for basketball and other university events requiring a large auditorium," the fact was, Flynn testified, that "unknown to the general public and before the bond issue vote, the university authorities had taken action on plans to construct a sports complex on the university campus, a few scant miles from the site of the proposed civic auditorium complex." He continued:

> The university complex will have facilities similar to those planned for the civic auditorium complex. Many who knew of the university's plans believed the proposed civic auditorium was a useless duplication of

facilities in a metropolitan area that did not need and could not afford two such facilities . . . . The public learned none of these facts . . . from the News or Tribune, or their Salt Lake television and radio stations. I have no doubt that the news reporters and management of the two newspapers knew of these facts and appreciated their relevance to the exercise of the franchise by the public at the bond election. If they did not know, they must be judged incompetent, since many members of the university faculty, the members of the university's board of regents, and some prominent businessmen in our community knew of the university's commitment to build facilities on the university campus. Assuming the local news media and those who control it knew these facts and are not guilty of incompetence, I often wondered why these facts were not revealed so that the public could decide whether we were to have two large auditoriums within a few miles of one another . . . [*Id.* at 361-362.]

Professor Flynn's testimony seems confirmed by the response submitted to the Senate subcommittee by J. W. Gallivan, publisher of the Salt Lake Tribune, see *id.*, part 2, at 890. Gallivan's entire answer to Flynn on this point runs as follows:

> Both Salt Lake City newspapers carried extensive stories on the possibility of a University of Utah complex as far back as 1960—before Professor Flynn came to Utah—noting in headlines that "two sports palaces were in offing for area," reporting in a lengthy 1962 story (also before Professor Flynn came to Utah) that plans for the University arena were "taking shape." The University plans were widely reported even though the Board of Regents had made no final decision or commitment. The Regents did not decide to build until June of 1965—some 19 months after the bond election for the County Complex—and did not become committed to build until July, 1967. [*Id.* at 890.]

By citing stories "as far back as 1960" and another in 1962, but none any nearer to the bond issue election of November 1963, Gallivan appears to concede Flynn's claim that the story was kept out of the papers—and, one can only assume, the broadcast stations as well—during the time the voters were deciding on the bond issue. A separately owned TV station, as in Wichita (see page 19 *supra*), might have made a significant contribution to public knowledge on this issue.

8) *Discrimination in program listings.* Evidence that newspapers owning local TV or radio stations discriminate in their program listings and related materials in favor of their own stations and against competing ones has appeared in a number of places, accompanied by a variety of ingenious justifications. For example:

(a) According to a recent report in *Editor & Publisher*, the trade journal of the newspaper industry, an antitrust suit against the three newspaper-TV cross-ownerships in Dallas-Fort Worth by a bankrupt UHF station there, charging that the cross-owned papers refused to run equal program listings or any at all for the station, has been settled out of court for $535,000. "Station owner awarded $1/2m for papers' tv listing ban," *Editor & Publisher*, February 9, 1974, at 9. The article reports deposition testimony by the copublisher of one of the defendant newspapers stating "that it was not possible to give KMEC equal listings because it would have necessitated enlarging the television log, a condition that [would] not leave enough room for advertising on the page . . . . He said further that readers were not interested in UHF station programs and that they would be unattractive be-

cause of too much white space in the log for Channel 33 which was not an all-day operation." *Id.* at 9.

(b) A petition on file with the FCC to deny renewal of the TV and radio licenses in St. Louis held by the Pulitzer Company, owner of the St. Louis Post-Dispatch, includes a copy of a daily television and radio listing from the Post-Dispatch (for Thursday, January 17, 1974) which shows that Pulitzer's TV station, channel 5, is listing first in each time category, ahead of channels 2 and 4; that Pulitzer's radio station is listed first in each time category; and that the program listings for this radio station, unlike all the other radio stations, appear in bold-face print. In the Matter of Pulitzer Publishing Co., Amendment to St. Louis Broadcast Coalition Petitions to Deny, FCC Dockets BRCT-30, BRCT-641, BRCT-520, January 28, 1974, at 24 and Appendix F.

(c) In *Midwest Radio-Television, Inc.*, 17 F.C.C.2d 290 (1969), the FCC specified issues for a renewal hearing on the licenses for the TV and radio stations in Minneapolis-St. Paul which have interlocking ownership with both daily newspapers in Minneapolis and both daily newspapers in St. Paul. The action was taken on the basis of testimony before the Senate Antitrust Subcommittee, and a follow-up letter to the FCC, by the manager of a competing station, KSTP, in Minneapolis-St. Paul. He made specific allegations that the newspapers discriminated in favor of their own stations and against his, including an alleged failure to mention specific KSTP programming in a "Highlights" column. *Id.* at 295-296. (Another specified issue was based on testimony that the newspaper-owned radio station obtained the rights to broadcast various sports events through the power of the newspapers to give or withhold coverage of the teams involved, testimony which the FCC said raised "a substantial question of fact . . . ." *Id.* at 294-295.) In a subsequent ruling in the case, *Midwest Radio-Television, Inc.*, 19 Pike & Fischer Radio Reg.2d 861 (1970), by the vote of four to three, the FCC changed its mind, declaring that its concern about the specified issues had been dissipated by affidavits and other statements taken from employees and agents of the licensees denying that any such discrimination or misconduct had taken place. It would seem hard to deny after reading this opinion, however, that the evidence of abuse on which the FCC originally acted had not been tested and was still there. Moreover, the dissenting opinion sets forth two conflicts of evidence on the program-listing issue which are not denied by the Commission majority and which indicate the posture of the facts involved: (i) It was agreed that the Minneapolis papers failed on a certain Sunday to list the American Football League professional football game being carried by KSTP, while listing the National Football League game being carried by their station, but the papers said this was because KSTP failed to notify them which game it would broadcast, a failure KSTP denied; (ii) It was agreed that when the papers purchased the radio station in 1952 they changed the format of their daily radio listings to put it at the top, which they explained as evidencing not discrimination against other stations but "pride of ownership." *Id.* at 874 n. 3. (On the issue concerning rights to sports events the original evidence was likewise unimpeached, and the FCC majority expressly conceded the existence of conflicting testimony regarding what was said at a crucial meeting. *Id.* at 867 n. 12.)

(d) In *Providence Journal Co.*, 16 Pike & Fischer Radio Reg.2d 693 (1969), it was again apparently a matter of record that the newspaper gave more space to its own stations than to others, but the FCC accepted the

paper's explanation that it had "sent a letter to all radio stations . . . inviting all stations to file schedule highlights for inclusion in its regular radio column," and that "only six stations replied to the offer . . . ." *Id.* at 694.

(e) In *WTAR Radio-TV Corp.*, 19 Pike & Fischer Radio Reg.2d 661, 684 (FCC Review Board, 1970), where the newspaper listed the guests to appear each night on the Merv Griffin show, broadcast by its cross-owned station, but not on the Johnny Carson show, broadcast by its competitor, the explanation given and accepted was that the Merv Griffin shows were just starting.

(f) In *Cumberland Gap Broadcasting Co.*, 24 F.C.C. 2d 393 (1970), the FCC held a hearing into the operations of a newspaper-radio combination in Middlesboro, Kentucky; the owner of the town's only newspaper and of one of its two AM stations was applying for, and ultimately got, a construction permit for the town's only FM station. The FCC's hearing examiner found the following facts which are relevant here:

> . . . .The newspaper publishes a daily schedule of the programs broadcast on Station WMIK [the station it owns]. Such service is provided without charge and is not accorded to other radio stations that are received in the area. The newspaper also carried the program logs of various television stations in Knoxville, Lexington, Johnson City and Bristol . . . . No one has requested that the other Middlesboro AM station be carried; but that service would be provided upon request . . . .
>
> The newspaper advertises on the radio station and vice versa . . . . The [newspaper] has not advertised on the other Middlesboro AM station . . . . [*Id.* at 397-398.]

9) *Newspaper-radio cross-ownership in a small town.* In the case just cited from Middlesboro, Kentucky, *Cumberland Gap Broadcasting Co.*, 24 F.C.C. 2d 393 (1970), the FCC held a rare hearing into newspaper-radio cross-ownership in a small town, occasioned by the cross-owner's application for the town's only FM license. (In a number of other cases where the owner of a town's only newspaper and only AM has applied for the only FM, the FCC has granted the application *without* a hearing; see, *e.g.*, *Manhattan Broadcasting Co.*, 23 Pike & Fischer Radio Reg.2d 1182 (1972).) Although the hearing examiner in the Middlesboro case gave the cross-owner's operations a clean bill of health and recommended approval of the FM application, which was done, a number of the facts found (in addition to those cited above) consitute evidence that the public in Middlesboro does suffer harmful effects from the cross-ownership, particularly in the form of diminished diversity and competition in news and opinion about local affairs.

Middlesboro is a "small, isolated community" in which the same family controls the only newspaper (the Daily News), one of the two AM stations (WMIK), and now, by virtue of the FCC's decision, the only FM station. The hearing examiner found that the newspaper-owned AM station "does not editorialize," having "a long-standing policy . . . not to get involved in controversial community matters" (24 F.C.C.2d at 397), and that "the FM station is not expected to editorialize" either (*id.* at 399). He further found, with respect to the news operations of the newspaper and the AM station:

> . . . In fact, there is active competition between the two staffs, although the *Daily News* provides copy of local news stories to Station WMIK for which the newspaper is not compensated. In addition, *Daily*

News reporters inform the station of fast breaking news events and a similar service is provided by the station to the newspaper. However, this is not standard practice. The newspaper does not telephone or otherwise inform other local radio stations of news stories. Such a procedure would be considered tantamount to "Montgomery Ward going over and putting in a showcase window in J.C. Penney's window."

. . . As previously noted, the newspaper provides Station WMIK with news stories before the other media gain the information as published in the *Daily News*. Even in matters of public urgency, news information gathered by its staff is not distributed to other radio stations, but ultimately becomes available on the news wires.

. . . .

Initially separate teams of reporters are sent by the station and newspaper to cover events. However, Middlesboro town meetings are covered by one media and the information is thereafter shared with the other . . . .

[24 F.C.C.2d at 397-398; citations to record omitted.]

10) *Economic abuse*. There is adjudicated evidence of abusive economic practices involving use of the leverage provided by newspaper-broadcast cross-ownership. In *Sarkes Tarzian, Inc.*, 18 Pike & Fischer Radio Reg. 2d 693 (1970), the FCC found that the company controlling a daily and weekly newspaper and a TV, AM, and FM station in Bloomington, Indiana—one of the cities that still have competing dailies—was offering a package rate plan whereby purchasers of a certain amount of newspaper advertising received a credit, in half that amount, applicable to any advertising they purchased on any of

the three broadcast stations. The FCC found this "inconsistent with the public interest," since "the licensee is clearly using the leverage of the exclusive broadcasting franchises as a means of gaining an advantage over a competitor in another field (here the newspaper field)," and accepted the licensee's statement that it would discontinue the practice. *Id.* at 694-95.

In the *Kansas City Star* antitrust case, where the newspaper had a TV and radio license in Kansas City, the jury found (among other things) that ". . . The Star used its dominant position to aid in its newspaper advertising, making it clear in some instances that advertisers could not buy time on WDAF-TV unless they also advertised in The Star papers," and in another instance refusing to sell television time to a magazine that competed with the papers. *Kansas City Star Co.* v. *United States*, 240 F.2d 643, 656 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957).

11) *New York City*. An article in [MORE] for December 1971, "News Blunts Probe of Video Mate," by Peter A. Lance, page 7, describes coverage by the New York Daily News of the FCC hearing on the license-renewal contest involving its commonly owned New York television station, WPIX. The article states that the News decided to run Associated Press coverage of the hearing, rather than assign its own reporter, so as to avoid charges of conflict of interest, but that "alas, the news service did it too well. When the copy was ripped off the Teletype in the *News* city room, editors discovered that The AP had not just reported testimony that made WPIX look good . . . ." The article goes on to compare, in detail, the AP dispatches on the hearings as they appeared on the wire and the edited versions as they appeared in the News, documenting its charge that passages reporting cross-examination of WPIX witnesses or other material

unfavorable to WPIX was customarily deleted, while favorable material was left in and played up in headlines. It states that on two days when "witnesses charged WPIX with racial bias in programming" and "the testimony went totally against the station," and the AP dispatches accurately reflected this (the AP leads are quoted), "the News did not print a line of either story."

12) *Newspaper-cable or broadcast-cable ties*. There is evidence of harmful effects stemming from the interest of the local newspaper owner, or a local broadcaster, in cable-television systems or franchises in the same community. While this does not bear directly on the issue of newspaper-broadcast cross-ownership, it does show harmful impacts, especially on media content, resulting from one form of local-media cross-ownership. If newspapers tend to ignore, slant, or buy the story of local cable franchising when their own ownership seeks the franchise, as this evidence shows them doing, no reason is apparent why the same tendency does not apply to other stories in which the newspaper's owner is interested, such as ones involving a cross-owned broadcast station, or why it does not apply to the content of other local media outlets he controls, such as a broadcast station. I cite a variety of such reports on coverage (or noncoverage) of the franchising process by interested newspapers (all from published sources) in my Reply Comments in FCC Dockets 18110 and 18891 (at 120-146) and in my article, "State, Federal and Local Regulation of Cable Television," 47 *Notre Dame Lawyer* 685, 693-694, 770-774, 794-803 (1972). See in particular the Reply Comments at 126-128 (episode in Tacoma, Washington); *id*. at 139-140 and 47 *Notre Dame Lawyer* at 697 & n. 79 (San Francisco); *id*. at 771-774 & n. 498 (Buffalo). See also "Blackout in Lansing," by David Anderson, *Columbia*

Journalism Review, March/April 1974, at 26, quoting statements by (among others) two former news employees of a Lansing, Michigan, TV station that they were ordered to deny news coverage to certain members of the city council who opposed the station owner's application for the local cable franchise. (These charges are also on file before the FCC, which has ordered a hearing on renewal of the station's license; see also the denial by the station owner in *Columbia Journalism Review*, July/August 1974, at 52.)

But the most thoroughly documented evidence of the harmful effects of newspaper-cable cross-ownership, which I reported at length in both my Reply Comments (at 129-137) and the Notre Dame article (at 693-694, 770-771, 798-799), and which has also been filed as comments with the FCC in the cross-ownership proceeding, Docket No. 18110, is a study by Alfred H. Hemingway, Jr., then a student at the Stanford Law School, which focused on San Jose, California, and the adjoining cities of Campbell and Santa Clara. "Daily Newspaper and CATV Local Market Crossownership: The Public Interest in CATV and Its Potential Defeat Through News Management, Conflict of Interest, and System Underdevelopment," August 1971, filed with the FCC as Reply Comments in Docket No. 18110. Without going into detail here, the cable-TV franchise in each of those cities was awarded to a joint-venture consisting of the owner of San Jose's two daily newspapers and the licensee of its only VHF television station. Hemingway researched the two newspapers for the period in question and reports, for example, that while these papers commonly published news of matters due to come up at meetings of the city councils of both San Jose and Campbell, in the case of the cable-franchise awards by both cities neither paper

mentioned the matter for a period of at least 40 days prior to the award. See Hemingway study at 26-27 & ns. 118, 121, reported in 47 *Notre Dame Lawyer* at 693. The awards themselves received less than conspicuous coverage in the two newspapers (*e.g.*, the San Jose award under a headline, "City Eyes Curfew Change," in two paragraphs sandwiched between an item on curfew ordinance revisions and another on the change of a street name), and in each case the stories did not mention that the company winning the franchise was controlled by the local newspapers and television station, referring only to the corporate names of the joint venturers. Hemingway study at 37, reported in 47 *Notre Dame Lawyer* at 693 n. 50.

13) *Broadcast editorializing*. The effect of newspaper-broadcast cross-ownership in discouraging broadcast editorializing is a subject Rand does deal with (see "options" report at 9, "current knowledge" at 135-136, 165-166), but I think inadequately. The available evidence, though not as comprehensive or authoritative as one would like, is considerably more substantial than Rand reports. The evidence Rand cites is the Litwin-Wroth study (George H. Litwin and William H. Wroth, *The Effects of Common Ownership on Media Content and Influence*, July 1969, filed by the NAB in FCC Docket No. 18110), and a consistent statement of Cherington, Hirsch and Brandwein, eds., TELEVISION STATION OWNERSHIP: A CASE STUDY OF FEDERAL AGENCY REGULATION (1971), at 98 (see "current knowledge" at 135-136). Also cited, with apparent agreement, is the discussion of this aspect of the Litwin-Wroth study in my Reply Comments before the FCC. See *id.* at 136.

Rand fails to do justice either in reporting the evidence or appraising its significance. In reporting the findings of the Litwin study on this point, Rand states ("current knowledge" at 135-136):

> . . . They found that newspaper owned television and radio stations editorialize less than other broadcast stations. In one of the newspaper-television combinations studied, for example, "there apparently is no sharing of any kind between the print and broadcast operations. The TV and radio stations do not editorialize because, first, they don't feel it is their role to make judgments on public issues, and second, they want to avoid any talk of 'collusion' in the policies of the broadcast and print operations."

Rand continues, referring to my Reply Comments: "Barnett suggests that while this finding is subject to the same methodological problems as the rest of the Litwin and Wroth study, it should be more reliable than the other findings because it 'is one to which the interviewees could be expected to provide reliable answers. Not only is it something they would know, but more important, it is something as to which the pro-station bias built into the interview sample . . . would probably not be operative'." *Id.* at 136, quoting my Reply Comments at 148 n.1.

The only thing Rand specifically reports about Litwin's "finding" on editorializing is, thus, the quoted statement referring to "one of the newspaper-television combinations studied." Rand ignores the totality of Litwin's interview results on this subject, which are far more broadly based, detailed, and significant than this one example—and which, in fact, are what I was referring to in the passage taken from my Reply Comments (see *id.* at 147-148 & n.1.). As I there pointed out, Litwin and Wroth interviewed owners, managers, and top profes-

sional staff of 30 broadcast stations and newspapers in six cities, and posed a multipart question on editorializing which yielded significant differences between singly-owned and commonly-owned media. Asked whether their station or newspaper editorialized on "political questions, candidates," 64 percent of the personnel from singly-owned media said yes, as against 47 percent from commonly owned media. On "violence," the percentages were 59 and 50; on "obscenity–pornography," 60 and 43; and on "smoking." a telling difference of 52 to 17 percent. See Litwin Study at 5-10 and Appendix C at 3. As I suggested in my Reply Comments and as Rand apparently agrees, there is no evident reason why these responses should be considered unreliable or infected by bias; indeed, their results run against the bias evident elsewhere in the study.

In the "options" report (at 9), Rand treats the point this way:

> . . . [I]n the category of broadcast editorializing, the Litwin study sponsored by the National Association of Broadcasters suggests that newspaper owned stations editorialized *less* than others, presumably at least in part to avoid charges of editorial collusion. This result is based on a small sample and cannot be extrapolated to all newspaper-television combinations without further evidence. But given the FCC's encouragement of broadcast editorials, Litwin's result argues against any claim of superior service by newspaper licensees.

Again, there is no indication of what Litwin's specific findings on the subject were, or of the size of his sample (30 media outlets in six cities), or of why the sample was so "small" as to be summarily dismissed, even though the results tally with the evident motive of cross-owners to avoid broadcast editorializing so as to avoid charges of

collusion or correlation. Nor does Rand note that the results also tally with other FCC cases, such as the *WHDH* case (quoted in my Reply Comments at 152-153), where the station expressly (and unsuccessfully) defended its policy-against-editorializing as "a factor which minimizes any question of concentration of control flowing from the common ownership of newspaper and broadcast interests." *WHDH, Inc.*, 15 Pike & Fischer Radio Reg. 2d 411, 427 (1969), *aff'd sub nom. Greater Boston Television Corp.* v. *FCC*, 20 Pike & Fischer Radio Reg. 2d 2052, 2076 (D.C. Cir. 1970). See also, *e.g., Cumberland Gap Broadcasting Co.*, 24 F.C.C. 2d 393, 397, 399 (1970). Finally, Rand does not indicate why, to the extent it concedes any force to Litwin's results on editorializing, it views them only as "argu[ing] against any claim of superior service by newspaper licensees," and not as supporting a charge of inferior service.

14) *One unexplored source*. The Senate Communications Subcommittee has recently conducted lengthy hearings, which concluded July 31, 1974, on the pending broadcast license renewal bill, including among other things the issues it raises concerning concentrated control of the media. I have not seen the record of those hearings, but I would not be surprised if it contained examples of harmful effects from local-media cross-ownership. If I were conducting a thorough search for such evidence, that is one place I would look.

In the Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
FILED
JUL 7 1977
MICHAEL RODAK, JR., CLERK

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1521

CHANNEL TWO TELEVISION COMPANY, ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *Respondents*

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1624

ILLINOIS BROADCASTING CO., ET AL., *Petitioners*

v.

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No. 76-1685

THE POST COMPANY, ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
COUNTER STATEMENT OF THE CASE	3
1. The FCC's Increased Emphasis on Diversification	3
2. The 1970 Proceeding	5
3. The Court of Appeals Decision	6
REASONS FOR NOT GRANTING A WRIT OF CERTIORARI	7
1. The Commission's Policy Concerning the Great Importance of Diversifying Ownership of Mass Media Supports The General Holding Of The Court of Appeals	8
2. The Commission's Reasons for Failing to Require Divestiture More Generally Are Invalid	10
3. The Validity of the Court's Final Holding	14
CONCLUSION	16

TABLE OF CITATIONS

CASES:	Page
Associated Press v. United States, 326 U.S. 1 (1945)	10, 11
Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1972)	9, 10
Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C. Cir. 1974)	5
Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976)	13
General Tele. Co. v. United States, 449 F.2d 846 (5th Cir. 1971)	5
Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970)	12
McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956), cert. denied, 353 U.S. 918 (1957)	4

BEST COPY AVAILABLE

	Page
National Broadcasting Corp. v. United States, 319 U.S. 190 (1943)	3
United States v. Storer Broadcasting Corp., 351 U.S. 192 (1956)	3, 8, 14
Administrative Decisions:	
Northeastern Indiana Broadcasting Co., 9 Rad. Reg. (P-F) 261 and 318(a) (1953)	4
Radio Station KFH Co., 11 Rad. Reg. (P-F) 1 (1955)	4
Washington Star Communications, 57 FCC2d 475 (1975)	15
Commission Rulemakings and Policy Statements:	
Amendment of the Multiple Ownership Rules, 18 Fed. Reg. 7796 (1953)	3
CATV, Second Report and Order, 23 F.C.C.2d 816 (1970)	4
Cable Television Systems, Second Report and Order, 55 F.C.C.2d 540 (1975), *appeal pending sub nom.* National Citizens Committee for Broadcasting v. FCC, D.C. Cir. No. 75-1933 (filed Sept. 22, 1975)	4
Duopoly Rules, 5 Fed. Reg. 2382 (1940); 6 Fed. Reg. 2282 (1941); 8 Fed. Reg. 16065 (1943)	3
Multiple Ownership, First Report and Order, Docket No. 18110, 22 F.C.C.2d 306 (1970)	4
Multiple Ownership, Further Notice of Proposed Rulemaking, 22 F.C.C.2d 339 (1970)	5, 9
Multiple Ownership, Notice, 33 Fed. Reg. 5315 (1968)	4
Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944)	3
Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965)	4
Report on Chain Broadcasting, FCC Docket 5060, May, 1941	3
Statutes:	
Communications Act of 1934, as amended	
28 U.S.C. 1254(1)	2
47 U.S.C. 301 (1970)	11
47 U.S.C. 307(d) (1970)	11

	Page
Agency Rules and Regulations:	
47 C.F.R. § 76.501 (1975)	4
Miscellaneous:	
Federal Communications Commission Annual Report, 1945	3
Federal Communications Commission Annual Reports, 1969-1973	13
H.R. 5577, 95th Cong., 1st Sess., March 24, 1977	16
H.R. 9583, 91st Cong., 1st Sess., March 26, 1969	16
H.R. 6968, 84th Cong., 1st Sess., June 22, 1955	16
H.R. 6977, 84th Cong., 1st Sess., June 22, 1955	16
H.R. 9865, 81st Cong., 2d Sess., December 6, 1950	16
H.R. 12993, 93d Cong., 2d Sess., March 28, 1974	5
S. Rep. 93-1190, 93d Cong., 2d Sess., Sept. 27, 1974	16
S. 3305, 91st Cong., 2d Sess., January 19, 1970	16
S. 2321, 84th Cong., 1st Sess., June 24, 1955	16
S. 3350, 83d Cong., 2d Sess., April 26, 1954	16

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OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent National Citizens Committee for Broadcasting (NCCB) respectfully urges this Court not to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals appears at FCC App. 1-60.[1] It reversed and remanded the FCC's Second Report and Order in *Multiple Ownership,* 50 F.C.C. 2d 1046, *reconsideration denied,* 53 F.C.C.2d 589 (1975), which appears at FCC App. 61-158. The Court of Appeals issued an explanatory order of its decision when it partially stayed the mandate on April 5. This appears at FCC App. 159-67.

JURISDICTION

This Court's jurisdiction has been invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission, having adopted a primary policy of maximizing diversity in the ownership of broadcast stations, was properly reversed by the Court of Appeals on grounds that it had arbitrarily differentiated among its licensees in setting the standard for divestiture of cross-owned media, and that the Commission used unsupported rationalizations to prefer the private economic interests of certain favored licensees over the long-standing public interest mandate for diversification.

---

[1] References to the FCC's Petition or Appendix will be cited as "FCC Pet." or "FCC App." Other abbreviations for petitioners' petitions are self-explanatory.

STATUTES INVOLVED

NCCB relies on the FCC's and Channel Two's petitions for a statement of the statutes involved, all of which appear in the Petitioners' Appendices.

COUNTER-STATEMENT OF THE CASE

1. The FCC's Increased Emphasis on Diversification of Ownership

Since the 1940's, the Federal Communications Commission, as one of its primary responsibilities under the public interest standard of the Communications Act of 1934, has been giving ever increasing importance to diversifying the ownership of sources of information. In 1941, it required NBC to divest one of its dual networks.[2] In 1941-43, it adopted "duopoly rules" barring common ownership of two local broadcast stations of the same type, and required divestiture within six months.[3] And in 1953, the Commission specified maximum numbers of TV, AM and FM stations allowed to be under common ownership nationally.[4]

Also, when choosing between competing applicants for licenses, the Commission has increased the importance of the diversification factor. In the 1950's it repeatedly found this factor determinative against a com-

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[2] Report on Chain Broadcasting, Docket 5060, May, 1941. *See* National Broadcasting Corp. v. United States, 319 U.S. 190 (1943).

[3] Duopoly Rules, 5 Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943). *See* 1945 F.C.C. Annual Report, at 12; *cf.* Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944).

[4] *See,* Amendment of the Multiple Ownership Rules, 18 Fed. Reg. 7796 (1953), *affirmed* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

peting applicant with co-located newspaper and broadcast interests.[5] In its *Policy Statement on Comparative Broadcasting Hearings,* 1 F.C.C.2d 393 (1965), the Commission held that such hearings had as a "primary objective" the "maximum diffusion of control of the media of mass communications," since "[d]iversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities."[6]

In 1970 the Commission, again "to promote maximum diversification of programming sources and viewpoints," *Multiple Ownership,* Notice, 33 Fed. Reg. 5315 (1968), barred future creation or transfer of TV-radio (AM/FM) combinations. *Multiple Ownership,* First Report and Order, Docket 18110, 22 F.C.C.2d 306 (1970).[7]

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[5] *E.g.,* Northeastern Indiana Broadcasting Co., 9 Rad. Reg. (P-F), 261 and 318a (1953); Radio Station KFH Co., 11 Rad. Reg. (P-F) 1; see also McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956) *cert. denied,* 353 U.S. 918 (1957).

[6] Id. at 394. In listing factors that would be taken into account in considering competing applicants, the Commission ranked diversification first:

> 1. • • • Diversification is a factor of primary significance since • • • it constitutes a primary objective in the licensing scheme.

Id.

[7] Contemporaneously, the Commission adopted rules requiring divestiture of cable systems by television networks and by television licensees in the same market. CATV, Second Report and Order, 23 F.C.C.2d 816 (1970); 47 C.F.R. § 76.501 (1975). *But see* Cable Television Systems, Second Report and Order, 55 F.C.C.2d 540 (1975), *appeal pending sub nom.* National Citizens Committee for Broadcasting v. FCC, D.C. Cir. No. 75-1933 (filed Sept. 22, 1975). The Commission had also adopted in 1966 rules

2. The 1970 Proceeding

Concurrently with its First Report, the Commission issued a Further Notice of Proposed Rulemaking, *Multiple Ownership,* Docket 18110, 22 F.C.C.2d 339 (1970), proposing to require divestiture within five years of all existing newspaper-broadcast or television-radio combinations in a single market. Future creation or transfer of newspaper-broadcast combinations would also be barred, for, the Commission found, "[i]t has now become clear that *the most significant aspect of the problem is the common control of television stations and newspapers of general circulation.* For . . . the public looks primarily to these two sources for its news and information on public affairs. (Id. at ¶ 26. Emphasis added.)

After extensive rulemaking proceedings, and spurred by Congress and the courts,[8] the Commission in 1975 issued its Second Report and Order. (FCC App. 61.) The Commission prohibited the creation of future TV-newspaper combinations in the same community. Even though the record was inconclusive on the question of whether actual abuses stemmed from broadcast-newspaper cross-ownership, the Commission acted to increase the diversity of media voices. (FCC App. 165.) However, with two Commissioners dissenting (FCC App. 123 and 128), the Commission refused to order

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requiring divestiture of cable systems owned by telephone companies. *See* General Tele. Co. v. United States, 449 F.2d 846 (5th Cir. 1971). Thus, the Commission has long imposed divestiture remedies on cross-ownerships involving media other than newspapers.

[8] *See, e.g.,* H.R. 12993, 93d Cong., 2d Sess., Mar. 28, 1974, requiring the Commission to complete Docket 18110 within six months; Columbus Broadcasting Coalition v. FCC, 505 F.2d 320, 330 (D.C. Cir. 1974).

general divestiture of existing co-located combinations (FCC App. 93-100). It claimed that "local ownership," "continuity of operations," and "local economic dislocations" outweighed "a mere hoped for gain in diversity." (FCC App. 93, ¶ 109.) The Commission therefore ordered divestiture solely of "egregious" combinations—*viz.*, small-market absolute monopolies.[9] And it would act in other situations only upon a showing of economic monopolization under the Sherman Act. (FCC App. 103.)[10]

3. The Court of Appeals Decision

Upon appeals brought by NCCB, several licensees facing divestiture, the National Association of Broadcasters, and the American Newspaper Publishers Association, the Court of Appeals reversed the Commission. (FCC App. 1.) It upheld the Commission's assertion of authority to act to increase diversity prospectively even though the Commission had found no established record of actual abuses flowing from cross-ownership. But the court reversed the Commission's decision that such a record is necessary before divestiture of existing cross-ownerships could be ordered. (FCC App. 47.) The court examined the reasons put forth by the Commission for this inconsistent posi-

[9] As long as the community had one other entering "city-grade signal," (the strongest signal possible) whether or not that station was licensed to the community in question, divestiture was not required. (FCC App. 96-97, § 114.) This narrow divestiture standard covered only seven of the 79 television-newspaper cross-owners; and only nine radio-newspapers cross-owners were ordered to divest. (FCC App. 113.)

[10] Reconsideration of the Second Report was denied. Multiple Ownership, Memorandum Opinion and Order, 53 F.C.C.2d 589 (1975) (FCC App. 148).

tion, and found them, upon thorough analysis of the record, to be invalid. As it later summarized:[11]

> We were faced with a situation in which the Commission had treated three indistinguishable groups very differently. Because of this, steps had to be taken to restore consistent administrative treatment. Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules, and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt, but which it had already indicated would be available with respect to the egregious 16).

REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

Petitioners argue that certiorari should be granted because of the considerable impact of the decision. We recognize this impact but nevertheless urge that certiorari should be denied. For the decision below establishes no new principle or policy but rather is clearly correct in its analysis and holding as to the Commission's policies.

The Court of Appeals affirmed the Commission in its stress on the importance of the diversification policy and its decision to impose prospective limitations against newspaper-broadcast cross-ownership

[11] Summary taken from the Court's Order (on Motion for Stay of Mandate), April 5, 1977, at 7 (FCC App. 167) (hereinafter "Stay Order").

(FCC App. 17-33). This rule is clearly within the Commission's authority, and, as NCCB establishes below, the Court of Appeals is correct on this issue. *E.g., United States v. Storer Broadcasting Corp.*, 351 U.S. 192 (1956).

On the divestiture aspect, the Commission drew the narrowest line imaginable, based on an absolute monopoly standard ("no incoming signal"), and "grandfathered" 90% of the cross-owned licensees in the country. The Court of Appeals correctly reversed this arbitrary distinction among broadcast licensees, because it is riddled with error, having neither evidence nor reasons for support.

The court's final disposition logically flowed from the above holdings. It has not, as the petitions seem to suggest, ordered the divestiture of every local cross-ownership in the country. Rather its decision affords the agency full opportunity upon remand to insure that its further actions serve the public interest both generally and in each particular situation. Thus, the court's order calls for a hard look by the Commission at each case, and permits further proceedings in which the Commission can determine, with the proper presumptions and upon rational analysis of the evidence, a fair and reasonable line to be drawn for requiring divestiture by rule.

1. The Commission's Policy Concerning the Great Importance of Diversifying Ownership of Mass Media Supports the General Holding of the Court of Appeals

In the Second Report, the Commission found that separate ownership of co-located newspapers and broadcast stations is markedly, and indeed almost uniquely, required in the public interest:

> If our democratic society is to function, *nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible* . . . . [I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.
>
> FCC App. 94-95, ¶ 111 (emphasis added).

The Commission correctly found that this consideration was especially applicable to newspaper-television cross-ownerships because of the prime importance of both the newspaper and the TV station in providing information on local issues. (FCC App. 98, ¶ 115.)[12]

The Court of Appeals was correct in sustaining this Commission policy. It pointed out, citing *Columbia*

[12] *See also* the Further Notice in 18110:

> In view of the primary position of the daily newspaper of general circulation and the television broadcast station as sources of news and other information, and discussion of public affairs, particularly with respect to local matters, *it is not desirable that these two organs of mass communication should be under the same control in any community.* A direct parallel would be the ownership of two television stations in the same community by the same person, which the Commission without substantial disagreement from any sources, has never permitted. *The functions of newspapers and television stations as journalists are so similar that their joint ownership is, in this respect, essentially the same as the joint ownership of two television stations.*
>
> 22 F.C.C.2d 339, 346 (1970) (emphasis added).

To the same effect, then Chairman Burch stated:

> "Clearly, the media cross-ownership matter warranting the most attention is that of VHF-TV and the daily newspaper. There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then is the guts of the matter."
>
> *Id.* at 350.

Broadcasting System v. Democratic National Committee, 412 U.S. 94, 122 (1972), that the public interest standard encompasses First Amendment principles, and specifically that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States,* 326 U.S. 1, 20 (1945). (FCC App. 21.) Surely there is no need for this Court to review the holding that the Commission can both stress and promote diversification of ownership of the media of mass communication.

2. The Commission's Reasons for Failing To Require General Divestiture Are Invalid

It follows that without divestiture, a situation that the Commission has found on its face to be adverse to the public interest will persist in many communities. (FCC App. 85.)[13] Nevertheless the Commission opted not to require divestiture generally, but rather to await showings of actual abuse by grandfathered cross-owners. The Commission may have the discretion to so act, if it sets forth valid public interest reasons. But even according the agency great deference, its reasons here are patently arbitrary, as the court below pointed out. (FCC App. 52-59.)

The Commission arbitrarily denigrated the value of diversified ownership in the context of divestiture, call-

[13] While the Commission states that the situation will improve over time with transfers, for many license periods in many communities the public interest in diversity will be adversely affected. Indeed, Commissioner Robinson pointed out that "in most of the markets involving newspaper-television station ownership, the stations have been commonly owned since the time of original license" and that "very few of [these] common ownerships . . . have been dissolved [by sale]." (FCC App. 142.)

ing it an "abstract goal" (FCC App. 93, ¶ 108), "a mere hoped for gain in diversity . . ." (*id.,* ¶ 109), and " . . . some theoretical increase in already existing diversity . . . ." (FCC App. 98, ¶ 114.) There is simply no basis for the FCC to stress so heavily the importance of diversification in the prospective rule and absolute monopoly situations, and then disparage it in, for example, the one newspaper-two TV situation or two newspaper-one TV situation.[14] Clearly the importance of the *Associated Press* principle (that the First Amendment assumes diverse information sources) upon which we have "staked our all" remains constant.

The Commission cited the possibility of "hardship for individual owners." (FCC App. 93.) But as the Court of Appeals stressed (FCC App. 34, 50), the broadcaster has no vested property interest; it must apply for renewal of license every three years, and takes the license subject to rules that the Commission has adopted to promote the public interest.[15] In any event, what is involved is divestiture over a five year period, not forfeiture. There is the possibility of exchanges with others similarly situated or eager to trade or of waiver of the rule if the licensee can show unusual hardship. There was no record support for a finding of general hardship, and the Commission itself concluded, "Our own evaluation is that the concern

[14] *See* Memorandum Opinion and Order on reconsideration (FCC App. 151, n. 9): "[W]e again reject [the] argument that commonly owned media provide diversity. It is unrealistic to expect the same level of diversity as would be offered if the entities were under separate ownership."

[15] *See* 47 U.S.C. 301, 307(d) (1970).

[over losses] may be exaggerated." (FCC App. 87, ¶ 95.)

The Commission mistakenly ruled against divestiture in order to preserve local ownership, expressing the fear that "many sales would have to be to outside interests." (FCC App. 93.) But as the court below pointed out (FCC App. 52-53), local ownership and involvement of ownership in management are simply presumptions to aid the Commission in deciding between competing applicants for a license. Unlike diversification, they are not factors of primary importance. The Commission routinely approves voluntary sales of stations to distant, absentee buyers. Indeed, the Commission's *prospective* rule bars local newspapers from acquiring television licenses because diversity was found to outweigh local ownership.[16]

The Commission stated that divestiture might disturb "continuity of operation . . . as the new owner would lack the knowledge of the community and would have to begin raw." (FCC App. 93).[17] But as Commissioner Robinson pointed out, holdovers in high-

[16] Further, as the Court of Appeals noted (FCC App. 53) divestiture will not necessarily impair local ownership and management. About one quarter of the 79 newspaper-TV combinations are not locally owned, so divestiture could improve these situations. Indeed, "there is no reason to suppose that local entrepreneurs will not find television an attractive investment." (*Id.*)

[17] Presumably this is also the "possibility of disruption of the industry" referred to by the Commission. (FCC App. 93, ¶ 109.) Ironically, after five years of deferring to this rulemaking virtually all ad hoc challenges on concentration of control grounds—in order to consider the matter on an industry-wide scale (*see, e.g.*, Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970))—the Commission refused to require widespread divestiture partially on grounds of "disruption to the industry."

level management often smooth the transition period (FCC App. 143), even assuming some unusual disruption from divestiture. Further, 79 TV divestitures over a five year period, for example, simply do not constitute disruptions inconsistent with the public interest. If they did, the Commission's position would be at odds with its practice of routinely approving license assignments. In the five year period 1969-1973, for example, the Commission processed 165 voluntary TV transfers.[18]

Finally, the Commission expressed the fear that "[l]ocal economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too." (FCC App. 93, ¶ 108.) There is not the slightest explanation or basis for the Commission's speculation. (See Court of Appeals Opinion, FCC App. 55.) [19]

The Court of Appeals was clearly correct in finding these reasons arbitrary and capricious. We submit that there is no need for review by this Court of the above analysis.

[18] See F.C.C. Annual Reports, 1969-1973, pp. 130, 148, 144, 167, 201, respectively. In the six years prior to the Order, the Commission approved without hearing 678 license assignments, at least 40% of which were not *pro forma* (FCC App. 54, n. 99).

[19] As the Court below correctly noted, the Commission never found a detriment to the public interest in terms of a reduction in the quality of broadcast programming because of divestiture. (*Stay Order*, FCC App. 166.) The Commission did refer in a footnote (FCC App. 93, n. 26) to a staff study, describing its methodology and conclusions; but it never indicated any reliance on that study in its decision, probably because it never placed its study on record for comments, although the "findings" were contrary to other studies which *were* in the record. *See* Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976).

3. The Validity of the Court's Final Holding

The court below therefore was correct (i) in approving the great importance assigned the diversification principle by the Commission, and (ii) in finding that the Commission erred in concluding that the other policies discussed above required it to find evidence of harm before ordering divestiture. The court's final holding thus logically followed—"that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." (FCC App. 60.) For in light of the underlying Commission policy, this is a sound way to restore consistent administrative treatment and fully protect the public interest in individual instances. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

Further, the court's decision allows leeway for general action by the Commission upon remand, if based upon reasonable analysis. Thus, it stated:

> Implementation of certain divestiture rules might require individual evidentiary hearings. If, for example, the Commission were to adopt on remand a policy of requiring divestiture where combinations have over 30% of the market in the community of operation, it would presumably be necessary to determine the market shares . . . by hearing . . . .
>
> (FCC App. 36, n. 53.)

In short, there will necessarily be a "Third Report and Order." This Court need not review a clearly defective "Second Report and Order."

We believe that the inequity of the Commission's Second Report and Order is pointed up by the situation

in Washington, D.C. News, particularly of a local nature, is dominated by the two Washington daily papers, the *Star* and the *Post,* and four VHF stations, two of which (Channels 7 and 9) are licensed respectively to the *Star* and the *Post.* Because of financial difficulties, the *Star* was sold to a new owner. Under the Commission's prospective policy, the new owner was required to divest itself of the newspaper or the TV station. The Commission waived the rule for a three year period.[20] Less than two years later, the owner announced plans to exchange WMAL-TV (Channel 7, Washington) for an Oklahoma City station (KOCO-TV) and stock of the company owning the latter station.

Contrast the *Star's* situation with the *Post's* under the Commission's divestiture policy. The *Post* is the dominant newspaper in Washington. Post-Newsweek's WTOP-TV (Channel 9) is a most important source of local news. Yet unlike the *Star,* the *Post* may retain both these strong news outlets; it is most unlikely that it will ever sell WTOP-TV. Thus, the residents of Washington receive information, to a substantial extent, from the same, rather than antagonistic or diverse sources. Since the weaker competitor is more likely to need equity financing, the prospective ban against cross-ownership will require that the weaker company is split up. Meanwhile, the dominant entity, grandfathered under the Commission's new rules, will simply obtain a greater share of the market.

---

[20] Washington Star Communications, 57 F.C.C.2d 475 (1975) .

CONCLUSION

The court bel w did not usurp the agency's policy making function. The Commission declared the overriding importance of diversification; the court simply affirmed. On the issue of divestiture, the court examined the Commission's reasons for not adhering to its diversification policy, and correctly found them arbitrary. In the circumstances, the court soundly concluded that to insure consistent administrative action and at the same time fully protect the public interest, divestiture is called for except where there is a clear showing that cross-ownership serves that interest. With this general guidance, the Court of Appeals simply remanded the proceeding to the Commission to devise a new, rational method for determining the divestiture question.

We submit, therefore, that further review at this time by this Court is unwarranted. If these requirements are to be changed, it should be done not by the courts but by the Congress, which has in the past interested itself in the matter of newspaper-TV cross-ownerships.[21]

---

[21] *See, e.g.*, H.R. 5577, 95th Cong., Mar. 24, 1977; Broadcast License Renewal Act, 93d Cong., S. Rep. 93-1190, Sept. 27, 1974; S. 3305, 91st Cong., Jan. 19, 1970; H.R. 9583, 91st Cong., Mar. 26, 1969; H.R. 6968 and H.R. 6977, 84th Cong., June 22, 1955; S. 2321, 84th Cong., June 24, 1955; S. 3350, 83d Cong., April 26, 1954; H.R. 9865, 81st Cong., Dec. 6, 1950.

Because the decision below is correct, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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July 6, 1977

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No. 76-1471

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY COMMENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY COMMENTS

The following reply comments are submitted by the Federal Communications Commission (Commission) in response to the Opposition to Petitions for a Writ of Certiorari (Opposition) filed in this and related cases by the National Citizens Committee for Broadcasting (NCCB). Briefly stated, NCCB's Opposition does not deal with the important issues raised by the Commission and other petitioners that warrant this Court's attention. Rather, by incorrectly stating the effect of the opinions of the court below in at least two critical respects, NCCB has obscured rather than illuminated these issues.[1]

[1] NCCB also incorrectly states that two Commissioners dissented from the Commission's refusal to order across-the-board divestiture of existing co-located newspaper-broadcast combinations (Opposition at 5-6). Commissioner Hooks would not have limited divestiture to instances of "pure

(Continued)

I

NCCB first seeks to avoid this Court's review of the important questions presented in this case by mistakenly contending that the court below did not go so far as to order that the Commission require general divestiture by existing co-located cross-owners (subject only to waiver in exceptional cases), but rather left the agency full discretion on remand to determine the nature and extent of divestiture "both generally and in each particular situation" (Opposition at 8). This interpretation of the court's mandate is simply belied by the court's own words in its opinion of March 1, 1977. There, after stating that the Commission "has sought to limit divestiture to cases where the evidence discloses that cross-ownership clearly harms the public interest," the court held that "precisely the opposite presumption is *compelled*, and that divestiture is *required* except in those cases where the evidence clearly discloses that cross-ownership is in the public interest"—and it added that such exceptions "could be accommodated through a waiver procedure" (FCC App. 60 and n.112; emphasis supplied). The court thus made it abundantly clear that, whatever the Commission's discretion might be in waiver situations, it had no choice in the context of rule making but to require across-the-board divestiture.[2]

(Continued)
monopoly," but stated that "[b]alancing inputs, I must concur with the majority's decision to the extent that it emphasizes a prospective means of attaining diversification rather than the harsh and unpredictable solution of divestments of an unprecedented scale." (FCC App. 125).

[2] The only support offered by NCCB for its contrary interpretation of the March 1 opinion is a single footnote (FCC App. 36, n.53; see Opposition at 14). But this footnote is a passing observation in connection with the court's treatment of a wholly different issue in the case—whether a divestiture order limited to the licensees whose cross interests the Commission found to be egregious could have been implemented without individualized hearings. In light of the subsequent language of the opinion at FCC App. 60, it is unreasonable to regard this footnote as in any way mitigating the effect of the court's holding.

If there could have been any doubt as to the court's intent under its original opinion, there can be none whatever after its further opinion granting the Commission's Motion for Stay of Mandate. In this unusual restatement—which was itself revised by amendment after its initial release[3]—the court sought to explain and clarify its previous holding. It characterized the above quoted language that a presumption against cross-ownership is "compelled" and divestiture "required" in all but exceptional cases as "part of the summary of our holding" (FCC App. 166). Then, after erroneously[4] declaring that "the only consistent and court approved policy" toward cross-ownership was that of "giving diversity of media ownership controlling weight", the court stated that it had

> * * * ordered the Commission * * * to ensure *that everyone* [*i.e.*, all existing cross-owners as well as all new applicants] *would be consistently treated under the standard already adopted for new license applicants* (subject of course, to an appropriate waiver procedure * * *). FCC App. 167 (emphasis added).

This careful, unequivocal language is no casual dictum; it is the court's twice reconsidered final formulation of the precise holding of the case. And it makes wholly untenable NCCB's attempt to portray the holding as a conventional remand leaving the Commission discretion to adopt a new rule providing for only limited divestiture. Accordingly, certiorari should be granted to review whether the court of appeals far exceeded its authority by dictating to the Commission the result to be reached on remand.

II

NCCB also mistakenly asserts that the decision below "establishes no new principle or policy" (Opposition at 7),

[3] The opinion in its original form is included as Attachment A to this reply.

[4] See Part II of this reply.

but merely sustains a policy which the Commission itself has promulgated and requires the agency to apply that policy uniformly. The court below, too, seeks to project this view of the case by referring to "the only consistent and court-approved policy in this field," that of "giving diversity of media ownership controlling weight" (FCC App. 167). In this case, the Commission did accord controlling weight to the need for diversity in adopting its prospective rules. But the Commission, as it demonstrated in its petition for certiorari (at 7–9), has *never* said that controlling weight must be given to diversity of ownership, or any other single component of the public interest standard, at all times and under all circumstances. To the contrary, the Commission's policy in developing cross-ownership rules over more than thirty years has been to balance several competing considerations, including not only the need to promote diversity but also the need to avoid unnecessary disruption of existing services on which the public has come to rely. In the past, this balancing approach has generally led the Commission to apply its cross-ownership rules prospectively only, and to require little or no divestiture.[5] The Commission did just that in this case. Thus, it is not the Commission, but the court below, which has elevated one component of the public interest standard into binding law by requiring that diversity be given controlling weight in *all* its rules relating to cross-ownership. Accordingly, certiorari should be granted to review (1) whether the court of appeals may substitute its judgment for that of the Commission as to the relevant weight to be accorded diversity of ownership and other policies in making rules under the public interest standard, and (2) whether the court may require that, because the Commission gave controlling weight to diversity in fashioning its

[5] NCCB's Opposition (at p. 3) singles out two instances in the period 1941–1943 when, under extreme circumstances, the Commission ordered divestiture. This is hardly a basis for implying that the agency has commonly required divestiture, either in broadcast licensing or in other matters.

prospective rules it must do so with respect to existing cross-ownerships.[6]

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AUGUST 5, 1977.

[6] NCCB also asserts that, because existing cross-owners are treated differently from prospective cross-owners, the Commission's Order is inequitable (Opposition at 14–15). This argument may be relevant to the validity of the Order and, if so, will be addressed in our brief on the merits. It is not relevant, however, to the question of whether this case warrants certiorari. Suffice it now to point out that prospective purchasers of a commonly owned newspaper or television station, who are on notice that they cannot purchase both, are in a wholly different position from existing cross-owners who, in reliance upon the Commission's encouragement and allowance of local cross-ownerships manifested in licensing proceedings over many years, have devoted time and resources to their broadcast operations.

ATTACHMENT A

United States Court of Appeals for the
District of Columbia Circuit

No. 75–1064

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
ELYRIA-LORAIN BROADCASTING CO., ET AL., INTERVENORS

No. 75–1152

OWOSSO BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75–1379

WJAG, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
WHAS, INC., ET AL., INTERVENORS

No. 75–1386

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75–1387

DAILY TELEGRAPH PRINTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
WHAS, INC., ET AL., INTERVENORS

No. 75–1388

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1567

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1614

THE BROCKWAY COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1618

GRAY COMMUNICATIONS SYSTEMS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

On Motion for Stay of Mandate

[Filed April 7, 1977]

Before BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*

PER CURIAM: Before us is a motion filed by the Federal Communications Commission to stay the mandate to be issued by this court pursuant to its opinion and order on the

merits of this case. The Commission suggests that immediate compliance with portions of our mandate would impose a "substantial burden" on its resources. Since the Commission is moving quickly to petition the Supreme Court for a writ of certiorari in this case, it asserts that such a burden ought not be required until the Supreme Court can act on its petition. The National Association of Broadcasters (NAB) supports the Commission's motion, arguing that immediate issuance of our mandate will require NAB's members to begin costly efforts leading to divestiture. The Department of Justice does not oppose the motion, but does not actively support it either. The National Citizens Committee for Broadcasting (NCCB) opposes the motion insofar as it would reinstate the requirement that petitioners to deny individual license renewal applications allege a Sherman Act section 2 violation as a precondition for a hearing on the question of undue economic concentration. NCCB would also have us stay that part of our order which vacates Commission orders requiring divestiture in 16 so-called "egregious" cases. It is not clear, however, that NCCB or anyone else will seek further review of this segment of our opinion.

Before ruling on these motions, it is important to review the salient points of our March 1 opinion. By its order in the cross-ownership case, the Commission divided its regulatory province into three parts. New broadcast licenses would not be issued to any applicant which also owned a newspaper co-located with the proposed broadcast station's area of license. Present co-located newspaper-broadcast combinations, with 16 exceptions, were grandfathered and, in addition, the Commission took the view that further challenges to the renewal of these stations' licenses would have to meet tougher threshold requirements. Divestiture was ordered only where the sole broadcast station in a locality was owned by the sole daily newspaper in the same locality.

The gist of our opinion is that the lines thus drawn between future and present co-located combinations and between the 16 egregious cases and all other present co-located

combinations were arbitrary and capricious. We first indicated that the Commission had authority to promulgate its prospective rules even though the record was inconclusive on the question whether actual "abuses" flowed from newspaper-broadcast cross-ownership. We agreed with the Commission that long-established principles indicated that it could act to increase the diversity of broadcast media voices even when there was no evidence that a lack of diversity was producing harmful side effects. We recognized that the Commission had consistently acted on this principle and had received the approval of the courts (including the Supreme Court on a number of occasions) for this policy approach. Indeed, in its instant motion, the Commission has not asked us to stay our mandate insofar as it approves the prospective cross-ownership rules. Thus now as in its defense on the merits, the Commission apparently asserts its authority and intention to act to increase diversity even though it has created no record of actual abuses stemming from cross-ownership.

Having asserted its authority and intention to act in this way with respect to applications for new licenses, however, the Commission insisted that it was required to find actual evidence of abuses before it could order divestiture of presently co-located facilities. The Commission itself recognized that such a shift of position had to be justified by reference to factors differentiating present from future licensees. One factor suggested was harm to the public interest in terms of a reduction in the quality of broadcast programming, but the Commission correctly found no record support for any such proposition. The Commission did assert policies competing with enhancement of diversity as support for its shift of emphasis, but on analysis we found that in the past these policies had consistently been given lesser weight than increased diversity and further that these policies if consistently applied in the future would require massive shifts in the practice of the Commission with respect to license transfers. We further found that the distinct treatment of

the 16 egregious cases was invalid under the Commission's announced divestiture rule since the record contained no evidence that justified their disparate treatment.

Thus, "[h]aving evaluated the policies and record presented to us, we [held] that the Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture." Slip op. at 50. In summarizing this holding, we said, "The Commission has sought to limit divestiture to cases where the evidence clearly discloses that cross-ownership harms the public interest." *Id.* at 60. And, we continued:

> For the reasons expressed above, we believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.

This final sentence is part of the summary of our holding that the retroactive rules are invalid, and its purpose was to indicate that the presumption upon which the Commission acted rendered the divestiture rule invalid. Nothing in our opinion supports a contrary conclusion.

Thus we were faced with a situation in which the Commission had treated three indistinguishable groups very differently. Because of this, steps had to be taken to ensure equal administrative treatment. Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules, and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to reopen rulemaking proceedings so that everyone would be equally treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt, but which it had already indicated would be available with respect to the egregious 16).

Against this background, it should be plain that staying our mandate in this case would, *pro tanto*, sanction unequal treatment of licensees. On the other hand, the Commission warrants that it wishes to file for review of our decision as quickly as possible, but that absent a stay it will incur substantial burdens, which could conceivably impede that effort. On consideration of these competing factors, we are persuaded to stay our mandate, only insofar as it applies to the Commission's grandfathering rules, until April 22, 1977, on the understanding that the Commission will have filed for certiorari by that date.

So ordered.

Per Curiam

George A. Fisher,

For the Court:

GEORGE A. FISHER,
Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1977

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Nos. 76-1471, 76-1521, 76-1595, 76-1604, 1624, and 1685

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

CHANNEL TWO TELEVISION COMPANY, ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

ILLINOIS BROADCASTING CO., INC., ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

POST COMPANY, ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

No. 76-1521

CHANNEL TWO TELEVISION COMPANY, ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

No. 76-1624

ILLINOIS BROADCASTING CO., INC., ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

No. 76-1685

POST COMPANY, ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. The six petitions for a writ of certiorari that have been filed in this case present two major questions: first, whether the Federal Communications Commission properly adopted a prospective rule that prohibits the grant of a new broadcast license to a person who controls a daily newspaper in the same community; second, whether the Commission properly concluded that existing newspaper-broadcast combinations in the same community should be dissolved only when the combination has a monopoly of the broadcast media.

The United States appeared before the Commission to argue that, as a matter of the proper interpretation of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, the Commission should order the dissolution of all existing newspaper-television combinations in the same market and decline to create new combinations. After the Commission adopted a rule barring the creation of new combinations but declining to dissolve most existing combinations, the United States argued in the court of appeals, where it was a statutory respondent to petitions filed by private parties, that the Commission had offered insufficient and inconsistent reasons for its decision not to dissolve existing combinations.

The court of appeals upheld the prospective ban and concluded that the Commission should treat existing combinations under the same rules that it applies to new combinations. It accordingly ordered the Commission to dissolve the existing newspaper-broadcast combinations.

2. The United States believes that the court of appeals correctly sustained the Commission's authority to decide not to permit the creation of any new communications combinations, and it continues to believe that the Commission did not properly support its decision not to apply to existing communications combinations the same rules it adopted to forbid the creation of new combinations.

The United States agrees with the Commission, however, that the court of appeals exceeded its authority to the extent that it went beyond setting aside the Commission's order and purported finally to decide administratively unresolved questions concerning cross-ownership in advance of their consideration by the Commission in proceedings on remand. See *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. After identifying the deficiencies in the Commission's reasoning, the court of appeals should have remanded the case to the Commission, leaving that agency free, in the exercise of its discretion, to formulate a new rule properly based on a reasoned application of the governing legal principles.

In these circumstances, an appropriate disposition of the case would be to deny the petitions challenging the prospective rule, and to grant the remaining petitions only for the purpose of summarily vacating the judgment of the court of appeals to the extent that the court of appeals has exercised discretion properly belonging to the Commission. The United

States recognizes, however, that because the terms of any remand would be closely related to the proper disposition of the merits of the challenge to the Commission's rules, and because of the general importance of the court of appeals' interpretation of the Communications Act, this Court may deem it more appropriate to give the case the detailed consideration that would require granting plenary review of all the petitions.

Therefore, although the United States agrees with much of the reasoning of the court of appeals and with the broad outlines of its judgment, it does not oppose the granting of review in this case. If the Court should grant review, the United States will argue (1) that the Commission's rule forbidding the creation of new communications combinations was proper, (2) that the Commission's rule permitting the continued existence of other communications combinations should be set aside, and (3) that the case should be remanded to the Commission.

Respectfully submitted.

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SEPTEMBER 1977.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement	3
I. Background	4
A. Diversification as a public interest factor	4
B. Newspapers as broadcast licensees	6
II. The Commission decision	8
A. Prospective rules	10
B. Existing combinations	12
III. The decision below	16
Summary of argument	18
Argument	21
I. The decision of the Commission not to require across-the-board divestiture of existing co-located newspaper-broadcast combinations was lawful, rational, and based on a consideration of all the relevant public interest factors	21
A. There was no record of harm from existing cross-ownership	22
B. There were countervailing factors affecting service to the public which weighted against widespread divestiture	23
1. Loss of continuity	23
2. Reduced local ownership	26
3. Economic dislocation	26
4. Unfairness to existing licensees	27
C. Grandfathering routinely accompanies the adoption of new policies	28
D. Divestiture was properly required in a limited number of cases where there was no other independently owned significant local media source	29

251-094—77

Argument—Continued — Page

II. The decision of the court of appeals to require divestiture of all existing co-located newspaper-broadcast combinations was an improper substitution of the court's judgment for that of the agency 31
A. There is no presumption that cross-owned stations do not serve the public interest 33
B. There is no merit to the court's attack on the competing values on which the Commission relied 37
C. There is no irrationality in the Commission's divestiture rule 39
III. The decision of the court of appeals to remand the record to the Commission "for adoption of a rule" was a usurpation of an administrative function 42
Conclusion 43

CITATIONS

Court decisions:

Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) 32, 39
Buckeye Cablevision, Inc. v. *Federal Communications Commission*, 387 F. 2d 220 (D.C. Cir. 1967) 29
Citizens Communications Center v. *Federal Communications Commission*, 447 F. 2d 1201 (D.C. Cir. 1971) .. 35, 37
Citizens To Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 32, 33, 39, 41
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 34
Columbus Broadcasting Coalition v. *Federal Communications Commission*, 505 F. 2d 320, *reh. den.*, 505 F. 2d 330 (D.C. Cir. 1974) 7
Consolo v. *Federal Maritime Commission*, 383 U.S. 607 (1966) 42
Crowder v. *Federal Communications Commission*, 399 F. 2d 569 (D.C. Cir.), *cert. denied*, 393 U.S. 962 (1968) .. 24

Court decisions—Continued — Page

Ethyl Corp. v. *Environmental Protection Agency*, 541 F. 2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) ... 32
Federal Communications Commission v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) 40
Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 5, 24
Federal Communications Commission v. *WOKO, Inc.* 329 U.S. 223 (1946) 32, 41
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17 (1952) 42
Federal Power Commission v. *Transcontinental Gas Corp.*, 365 U.S. 1 (1961) 39
Federal Power Commission v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976) 42
Fidelity Television, Inc. v. *Federal Communications Commission*, 515 F. 2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975) 35, 41
Greater Boston Telecasting Corp v. *Federal Communications Commission*, 444 F. 2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) 27, 31, 41, 42
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 41
Kennecott Copper Corp. v. *Train*, 526 F. 2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) 28
Lesavoy Foundation v. *Comm'r*, 238 F. 2d 589 (3d Cir. 1956) 28
Logansport Broadcasting Corp. v. *United States*, 210 F. 2d 24 (D.C. Cir. 1954) 37
Massachusetts Bay Telecasters v. *Federal Communications Commission*, 261 F. 2d 55 (D.C. Cir. 1958) ... 31, 41
Melody Music v. *Federal Communications Commission*, 345 F. 2d 730 (D.C. Cir. 1965) 40
National Association of Independent Television Producers & Distributors v. *Federal Communications Commission*, 516 F. 2d 526 (2d Cir. 1975) 36
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 25, 40
National Labor Relations Board v. *Food Store Employees Union, Local 347*, 417 U.S. 1 (1974) 42

Page

Court decisions—Continued
National Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953) 41
Owensboro On The Air, Inc. v. *United States*, 262 F. 2d 702 (D.C. Cir. 1958) 37
Pacific Coast European Conference v. *United States*, 350 F. 2d 197 (9th Cir. 1965) 39
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) ..32, 38, 39
Pinellas Broadcasting Co. v. *Federal Communications Commission*, 230 F. 2d 204 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956) 7
Public Interest Research Group v. *Federal Communications Commission*, 522 F. 2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) 35
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367 (1969) 34
Roschen v. *Ward*, 279 U.S. 337 (1929) 40, 41
Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 (1947) 29, 33, 39
South Prairie Construction Co. v. *Local 627, I.U.O.E.*, 425 U.S. 800 (1976) 42
South Terminal Corp. v. *Environmental Protection Agency*, 504 F. 2d 646 (1st Cir. 1974) 28
Storer Broadcasting Co. v. *United States*, 240 F. 2d 55 (D.C. Cir. 1956) 5, 25
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) 32
United States v. *Detroit and Cleveland Navigation Co.*, 326 U.S. 236 (1945) 32
United States v. *Maher*, 307 U.S. 148 (1939) 29
United States v. *Pierce Auto Lines*, 327 U.S. 515 (1946) .. 32
United States v. *Radio Corp. of America*, 358 U.S. 334 (1959) 7, 31
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 4, 5, 25
Wheeling Antenna Co. v. *United States*, 391 F.2d 179 (4th Cir. 1968) 30
Agency decisions:
CATV Rules, 2 F.C.C. 2d 725 (1966) 28
CATV Rules, 36 F.C.C. 2d 143 (1972) 28

Page

Agency decisions—Continued
Cowles-Florida Broadcasting, Inc., 62 F.C.C. 2d 953 (1977), *appeal pending sub nom. Central Florida Enterprises, Inc.* v. *Federal Communications Commission*, No. 76-1742 (D.C. Cir.) 5
Daytime Skywave Transmission Rules, 18 Pike & Fischer Rad. Reg. 1845 (1959) 28
FM Broadcast Rules, 40 F.C.C. 720 (1962) 28
Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 (1943) 4, 26
Multiple Ownership Rules (Docket No. 8967), 18 F.C.C. 288 (1953) 5, 25
Multiple Ownership Rules (Docket No. 14711), 45 F.C.C. 1476 (1964) 4, 5, 26
Multiple Ownership Rules (Docket No. 18110):
Notice of Proposed Rule Making, 33 Fed. Reg. 5315 (1968) 8
First Report and Order, 22 F.C.C. 2d 306 (1970) .. 8, 26
Further Notice of Proposed Rule Making, 22 F.C.C. 2d 339 (1970) ..... passim
Memorandum Opinion and Order, 45 F.C.C. 2d 768 (1974) 9, 12
Newspaper Ownership of Radio Stations (Notice of Dismissal of Proceeding), 9 Fed. Reg. 702 (1944) .. 7
Policies Relating To The Broadcast Renewal Applicant, 40 Pike & Fischer Rad. Reg. 2d 763 (1977), *review pending sub nom. National Black Media Coalition* v. *Federal Communications Commission*, No. 77-1500 (D.C. Cir.) 5
Policy Statement On Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965) 5, 24
Report on Chain Broadcasting (Order No. 37, Docket No. 5060) (1941) 25
Rules and Regulations Governing Television Broadcast Stations, 6 Fed. Reg. 2284 (1941) 4
Rules Governing High Frequency Broadcast Stations, 5 Fed. Reg. 2382 (1940) 4
Telephone Terminal Equipment Rules, 59 F.C.C. 2d 83 (1976) 28
WGAL Television, Inc., 62 F.C.C. 2d 527 (1976) 23

	Page
Statutes and Regulations:	
28 U.S.C. §1254(i)	2
28 U.S.C. §2342(1)	16
Administrative Procedure Act, 80 Stat. 381, as amended:	
5 U.S.C. §553	37
5 U.S.C. §706	3
Civil Aeronautics Act of 1938, 52 Stat. 973	29
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§151 *et seq.*:	
47 U.S.C. 152(a)	2
47 U.S.C. 154(i)	2, 4
47 U.S.C. 154(j)	2
47 U.S.C. 301	2, 4
47 U.S.C. 303(g)	2, 34
47 U.S.C. 303(r)	2, 4
47 U.S.C. 307(a)	2, 4
47 U.S.C. 307(d)	2, 4
47 U.S.C. 308(a)	2, 4
47 U.S.C. 309(a)	2, 4
47 U.S.C. 309(d)(1)	2, 4
47 U.S.C. 402(a)	2, 16
Motor Carrier Act of 1935, §206, 49 Stat. 543	29
Rules and Regulations of the Consumer Product Safety Commission:	
16 C.F.R. §1201.1(b)	28
16 C.F.R. §1207.2	28
Rules and Regulations of the Federal Communications Commission:	
47 C.F.R. §1. 597	24
47 C.F.R. §73.35	3
47 C.F.R. §73.188	30
47 C.F.R. §73.240	3
47 C.F.R. §73.315	30
47 C.F.R. §73.636	3
47 C.F.R. §73.685	30
Rules and Regulations of the Food and Drug Administration:	
21 C.F.R. §10.90(b)(6)	28

	Page
Miscellaneous:	
Baer, Geller & Grundfest, *Newspaper-Television Cross Ownership: Options for Federal Action*, pp. v, 23, 39–24 (1974)	10
Comments of American Newspaper Publishers Ass'n in Opposition, App. B, Study by Financial Consulting Unit of the First National City Bank	14
Comments of the American Newspaper Publishers Ass'n in Opposition, App. E, Table IV	8
Congressional Quarterly Almanac (Vol. XXX), pp. 714–17 (1974)	15
FCC Eleventh Annual Report (1946)	26
H.R. Rept. No. 2426, 82nd Cong., 2d Sess. (1952)	7
H.R. Rept. No. 1297, 85th Cong., 2d Sess. (1957)	35
H.R. Rept. No. 93–961, 93rd Cong., 2d Sess. (1974)	15
S. Rept. No. 93–1190, 93rd Cong., 2d Sess. (1974)	15

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

The Federal Communications Commission respectfully asks the Court to reverse the judgment of the court of appeals in this case insofar as that court (1) set aside a Commission decision, at the close of rule making, not to break up existing co-located newspaper-broadcast station combinations except in cases of effective monopoly, and (2) required the Commission on remand to order across-the-board dissolution of all such combinations subject only to waiver in exceptional circumstances.

OPINIONS BELOW

The opinion of the court of appeals (App. 339) [1] is reported at 555 F. 2d 938. The order granting in part the Commission's

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[1] "App." citations refer to the joint appendix produced by the petitioners in this case and in five consolidated cases.

251-094—77——2

motion for stay of mandate (App. 435) is reported at 555 F. 2d 967. The orders of the Commission (App. 134, 317) are reported at 50 FCC 2d 1046 and 53 FCC 2d 589.

JURISDICTION

The court of appeals entered judgment on March 1, 1977 (App. 432). A partial stay of mandate was granted on April 5, 1977 (App. 435). The Commission filed its petition for certiorari on April 22, 1977, within the allotted time, invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court granted the writ on October 3, 1977, and consolidated the case with Nos. 76–1521, 76–1595, 76–1604, 76–1624 and 76–1685.[2]

QUESTIONS PRESENTED

Whether the Federal Communications Commission lawfully and reasonably determined that, in the absence of a showing of harm, the public interest did not justify rules requiring divestiture by existing, previously approved, co-located newspaper-broadcast combinations, except in cases of effective local media monopoly.

Whether the court of appeals exceeded the proper role of a reviewing court by substituting its judgment for that of the Commission and directing the agency to adopt rules ordering divestiture by all existing co-located newspaper-broadcast combinations, subject only to waiver in individual cases.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Sections 2(a), 4(i), 4(j), 301, 303(g), 303(r), 307(a), 307(d), 308(a), 309(a) and 309(d)(1) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 152(a), 154(i), 154(j), 301, 303(g), 303(r), 307(a), 307(d), 308(a), 309(a) and 309(d)(1); and Section 10(e) of the Administrative Procedure Act, 80 Stat. 381, as

[2] In two of these cases, Nos. 76–1595 and 76–1604, the Commission is named as a respondent. In this brief, the Commission appears only as petitioner in No. 76–1471. Its response in the related cases will be submitted in due course.

amended, 5 U.S.C. § 706. The Communications Act provisions are set forth at App. 27–32. The pertinent regulations of the Federal Communications Commission, 47 C.F.R. §§ 73.35, 73.240 and 73.636, are set forth at App. 243 and 337.

STATEMENT

The FCC adopted new multiple ownership rules and policies in 1975 to govern its consideration of applications for radio and television licenses. For the first time, its rules dealt with the licensing of broadcast stations to owners of co-located newspapers—a matter the Commission had addressed up to that time on an *ad hoc* basis. The new rules and policies barred the creation of new co-located newspaper-broadcast combinations, and they required dissolution within five years of existing combinations which constituted effective monopolies of local mass communications media. The Commission did not require divestiture in communities where a newspaper-broadcast combination faced competition from another local newspaper or broadcast station. *Second Report and Order* (Docket No. 18110), 50 F.C.C. 2d 1046 (App. 134).

The court of appeals affirmed the prospective rules barring creation of new combinations. It invalidated those parts of the rules and decision which declined to break up existing combinations in non-monopoly communities and which required dissolution of such combinations in monopoly communities. The court of appeals held that the FCC could not confine its divestiture requirement to monopoly situations, but that it must adopt rules on remand requiring dissolution of all co-located newspaper-broadcast combinations unless it can find exceptional circumstances in particular cases warranting waiver. 555 F. 2d 938 (App. 339).

The Commission and other parties below petitioned this Court for a writ of certiorari to review the decision below insofar as it invalidated the rules and policies governing existing local newspaper-broadcast combinations. Some other parties petitioned for review of the decision also insofar as it af-

firmed the prospective bar to new combinations. The Court granted all the petitions by order of October 3, 1977.

In this statement, we set forth briefly (1) the statutory and historical background for the Commission's action before discussing (2) the cross-ownership decision itself and, finally, (3) the decision of the court of appeals.

I. BACKGROUND

The FCC regulates broadcasting under a statutory scheme that requires broadcasters to apply for and obtain initial licenses and periodic renewals on findings by the agency that grant of the applications will serve the public interest, convenience and necessity. 47 U.S.C. §§ 302, 307(a) and (d), 308 (a), 309(a) and (d). The Communications Act requires the FCC to make the statutory public interest findings as to each application; but it also authorizes the adoption of general rules and policies to govern actions on individual applications, subject to waiver in exceptional circumstances. 47 U.S.C. §§ 154 (i), 303(r). *See, e.g., United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202–206 (1956).

A. DIVERSIFICATION AS A PUBLIC INTEREST FACTOR

Diversification of ownership of broadcast facilities has been a policy goal almost since the FCC came into existence in 1934, as part of its perception of the public interest. In the early 1940s, the Commission adopted rules prohibiting ownership or control by a single licensee of more than one station in each broadcast service (AM or FM radio or television) in the same geographic area.[3] Similarly, but without regard to the location of the stations, the Commission has adopted rules

[3] *Multiple Ownership of Standard Broadcast Stations* (AM radio), 8 Fed. Reg. 16065 (1943); *Rules and Regulations Governing Television Broadcast Stations*, 6 Fed. Reg. 2284 (1941); *Rules Governing High Frequency Broadcast Stations* (FM radio), 5 Fed. Reg. 2382, 2384 (1940); *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 FCC 1476 (1964).

limiting the total number of broadcast outlets in each service which a single licensee can own or control.[4]

Both sets of rules "seek to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest." [5] Similarly, the Commission has recognized diversification as a "factor of primary significance" in initial comparative licensing decisions involving applicants for new licenses.[6] But it is not the only consideration in determining where the public interest lies, either in specific licensing adjudications or in statements of broad policy to govern such adjudications. The Commission in 1965 summarized its "primary objectives" in choosing among applicants for a broadcast license as "first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." [7]

[4] *Multiple Ownership of AM, FM and Television Broadcast Stations*, 18 FCC 288 (1953). This Court sustained the Commission's authority to adopt multiple ownership rules in *United States* v. *Storer Broadcasting Co., supra.* On remand from this Court, the District of Columbia Circuit sustained the specific limits the Commission had established on the ground that they were based on the Commission's experience, "coupled with a design to avoid undue disruption of existing station ownership." *Storer Broadcasting Co.* v. *United States*, 240 F. 2d 55, 56 & n. 3 (1956).

[5] *Multiple Ownership of Standard, FM and Television Broadcast Stations, supra*, 45 FCC at 1476–77.

[6] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). The 1965 policy governs only comparative hearings on applications for initial licensing. For the most recent statement of Commission policy on comparative renewal hearings, see *Policies Relating to the Broadcast Renewal Applicant*, 40 Pike & Fischer Rad. Reg. 2d 763, 776 (1977), *review pending sub nom. National Black Media Coalition* v. *FCC*, No. 77–1500, D.C. Circuit, and *Cowles Florida Broadcasting, Inc.*, 62 FCC 2d 953, 955–957 (1977), *appeal pending sub nom. Central Florida Enterprises, Inc.* v. *FCC*, No. 76–1742, D.C. Circuit.

[7] *Id. See also Federal Communications Comm.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.").

B. NEWSPAPERS AS BROADCAST LICENSEES

The Commission never regarded its policy generally favoring diversification of ownership and control as a barrier to its granting licenses to newspaper owners when, in its judgment and on consideration of all relevant factors, a grant would serve the interest of the public. Many newspaper owners contributed to the development of the broadcast industry as pioneers in a new technology that was adaptable to many of the same news dissemination functions the newspapers had long performed. In the early days of both radio and television, when there was a shortage of competent applicants, the Commission even encouraged newspaper publishers to enter broadcasting because their performance generally could be relied upon and they would bring strong journalistic traditions to the new medium. The Commission has repeatedly renewed the licenses of newspaper-broadcast cross-owners on findings that they have served the public.[8]

The Commission has long recognized, however, that newspaper-broadcast combinations may raise problems of media concentration. In the early 1940s, at the same time the Commission was adopting rules limiting licensees to a single station in each service in a given geographical area,[9] it considered similar proposed rules for newspaper-radio cross-ownership in an extensive rule making proceeding. The Commission terminated the proceeding without adopting rules, concluding that the "grave legal and policy questions involved" made it inadvisable to bar such combinations by rule. Reaffirming the "general principle that diversification of control of such media is desirable," the Commission decided to continue resolving the public interest questions of newspaper-radio cross-ownership on a

[8] 555 F. 2d at 945 (App. 356); 50 FCC 2d at 1074–75 (App. 190). See also *Multiple Ownership of Standard, FM and Television Broadcast Stations* (Docket No. 18110), *Further Notice of Proposed Rulemaking*, 22 FCC 2d 339, 350 (concurring and dissenting statement of Chairman Burch) (App. 124), 351 (concurring statement of Commissioner Lee) (App. 125); *Policy Statement on Comparative Broadcast Hearings, supra*, 1 FCC 2d at 405 (concurring statement of Commissioner Lee).

[9] See p. 4 & n. 3, *supra*.

case-by-case basis.[10] That practice continued until the Commission adopted the rules that are under review in these cases.

Congress never has adopted legislation specifically addressing newspaper-broadcast combinations, although it has considered such legislation.[11] Nor have the courts required any particular approach to cross-ownership,[12] although in recent cases, during the pendency of the Commission's rule making proceeding, they approved the agency's practice of deferring consideration of structural cross-ownership questions to await the outcome of the rule making in Docket No. 18110.[13] The Commission's newspaper-broadcast cross-ownership policy thus has evolved administratively as the broadcast industry has matured, its most recent statement coming in the rules now under review.

As this policy has evolved and as the industry has matured, there has been a substantial decrease in recent years in both the percentage of television stations owned or controlled by local newspapers and the absolute number of co-located newspaper-television combinations. In 1950, 40.2% of the nation's commercial television stations were commonly owned or controlled with newspapers published in the same community. By

[10] *Newspaper Ownership of Radio Stations* (Notice of Dismissal of Proceeding), 9 Fed. Reg. 702, 703 (1944). The Commission forwarded a summary of the evidence it had compiled in its rule making proceeding to the appropriate committees of Congress to inform them of the facts and "for any consideration which they may desire to give to the matter." *Id.*

[11] *E.g., H.R. Rept. No. 2426* (Conference Report), 82d Cong., 2d Sess. 18–19, July 1, 1952 (conference committee omitted House provisions forbidding "discrimination" against newspaper owners in licensing decisions, stating that the FCC was not authorized to "discriminate" against an applicant because of its interest in a newspaper).

[12] *See Pinellas Broadcasting Co.* v. *FCC*, 230 F. 2d 204, 208–209, and n. 6 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956). This Court did say, in dictum, that the public interest standard might permit denial of a license application "when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351–52 (1959).

[13] *E.g., Columbus Broadcasting Coalition* v. *FCC*, 505 F. 2d 320, 324–25, *reh. denied*, 505 F. 2d 330 (D.C. Cir. 1974).

1969, the percentage had declined to 14.1, although the number of combinations had more than doubled. When the FCC adopted its *Second Report and Order* in Docket No. 18110, the percentage was only 10.4. A decline in absolute numbers began after a peak in 1955. In that year, 127 television stations were in co-located combinations with newspapers. By the end of the Commission's proceeding in Docket No. 18110, there were only 79 such combinations.[14]

II. THE COMMISSION DECISION

The Commission opened a proceeding in 1968 looking toward the adoption of prospective rules that would bar ownership of more than one station of any kind in a single market. The proposed rules, known as the "one-to-a-market rules," would not have required divestiture, but were to govern applications for initial licenses and applications for transfer of licenses to new parties. The notice of proposed rulemaking did not address newspaper-broadcast combinations.[15]

The Commission issued its *First Report and Order* in Docket No. 18110 in 1970, adopting the prospective rules essentially as proposed.[16] At the same time, it issued a *Further Notice of Proposed Rulemaking* to consider whether changed circumstances warranted either a prospective ban on co-located newspaper-broadcast combinations or dissolution of existing radio-television and newspaper-broadcast combinations through

[14] Comments of the American Newspaper Publishers Ass'n in Opposition, App. E, Table IV, filed April 2, 1971; *Second Report and Order*, 50 FCC 2d at 1061, 1080 n. 29 (App. 163–64, 200–02). *Second Report and Order*, App. D., 50 FCC 2d at 1098 (App. 242). Since the record closed in the FCC's proceeding, transfers of either newspapers or television stations have reduced the number of co-located combinations still farther to 65. Three additional applications to transfer television stations are pending before the FCC, and, if granted, they would bring the number of newspaper-television combinations to 62. The FCC's order would have broken up seven more of those combinations within five years. Comparable figures are not readily available for newspaper-radio combinations, but the trend is the same.

[15] *Multiple Ownership of Standard, FM and Television Broadcast Stations* (Docket No. 18110), 33 Fed. Reg. 5315.

[16] 22 FCC 2d 306 (App. 33).

divestiture.[17] The Commission invited comment on whether either of these courses of action was necessary to promote diversity or was otherwise required by the public interest. The Commission also expressed concern about the potential disruptive effects of divestiture, and invited comment on that aspect of the proposed rules.[18]

The *Further Notice* raised widespread interest and prompted filings and other participation by some 200 parties.[19] Participants included broadcast and newspaper interests, public interest groups, academic and other research entities, and the Antitrust Division of the Department of Justice. A number of studies were submitted supporting various policy viewpoints,[20] and the Commission heard three days of oral argument by all participants who requested time.[21]

The comments—and the Commission's analysis—had two principal threads: antitrust policy and broadcast regulation under the public interest standard. The antitrust policy arguments focused on the question whether there was undesirable concentration in some identifiable advertising market. The arguments relating to broadcast service and urging divestiture concentrated on diversification of control of information sources as a means of informing the public about local news and interests and providing outlets for local expression. Those supporting the Commission's proposed divestiture rules focused on the potential for abuse from common ownership to limit competition or propagandize, but there was no showing of any pattern of abuse from existing cross-ownerships.[22] Indeed, those supporting the proposed rules relied almost entirely on theoretical and policy arguments.[23] Those opposing the proposed rules

[17] 22 FCC 2d 339 (App. 101).

[18] *Id.*

[19] *Second Report and Order*, Appendix A, 50 FCC 2d at 1090–92 (App. 221).

[20] *Id.*, Appendix B, 50 FCC 2d at 1093–94 (App. 226).

[21] *Memorandum Opinion and Order*, 45 FCC 2d 768, 770 (1974) (App. 127). *See* Transcript of oral argument in Docket No. 18110.

[22] 50 FCC 2d at 1056, 1072–73 (App. 153, 186). See 50 FCC 2d at 1056–1074 (App. 153–188).

[23] *Id.*

argued that newspapers and broadcast stations do not compete in the same product market, that there is an abundance of competition in the relevant geographic markets, that there is no showing of economic power from cross-ownership, that widespread divestiture would have an undesirable economic impact, that cross-ownership does not mean that the two entities speak with the same voice, and that common ownership contributes to better service.[24]

The Commission gave due consideration to antitrust policy; but its primary concern in developing diversification rules was the interest of the public in good local broadcast service.[25] The studies attempting to show an affirmative need for broad divestiture were inconclusive and, in some cases, unrealistic. Nor did the studies on the other side demonstrate a continuing need to encourage new newspaper-broadcast combinations.[26] Accordingly, although it found guidance and support for its decision in the studies, the Commission relied primarily upon policy considerations in devising its prospective rules and in determining where to draw the line on divestiture.

A. PROSPECTIVE RULES

Finding changed circumstances which no longer required it to encourage or even permit new licensing of newspaper-broadcast combinations, the Commission adopted a flat prospective ban against new cross-ownerships, whether created by initial

[24] *Id.*

[25] 50 FCC 2d at 1048, 1078–81 (App. 138–39, 196–203).

[26] *Id.*, 50 FCC 2d at 1058, 1072–74, 1079 nn. 27 & 28, 1115 (App. 157–58, 185–88, 199–200, 281–83). The court of appeals agreed on review that the studies had provided "little reliable 'hard' information" and that they were "largely inconclusive." 555 F. 2d at 956–57 (App. 395–96). One study, by the Commission's own staff, found "an undramatic but nonetheless statistically significant" superiority in newspaper-owned television stations as to several categories of local programming. 50 FCC 2d at 1078 n. 26 (App. 198; *Id.*, App. C, 50 FCC 2d at 1094–98 (App. 230–41). See also Baer, Geller & Grundfest, *Newspaper-Television Cross-Ownership: Options for Federal Action* v, 23, 39–42 (1974).

application and construction or by acquisition.[27] This was not a reflection on the efforts of existing combination owners in diligently serving the public interest.[28] Instead, it was simply based on an effort to advance the Commission's long-standing policy of promoting diversification of ownership in the hope that it would offer diversity in the marketplace of ideas—a "worthwhile" goal not dependent on its being "urgent to be justified." [29] The Commission conceded that diversification of ownership offers no guarantee that this will result in diversity of viewpoints.[30] However, in the case of future licensing, if there was even a small gain in diversity it was worth pursuing—there would be no disruption of existing service and therefore the Commission could singularly focus on the abstract goal.[31]

The "changed circumstances" on which the Commission relied were the maturity of the broadcast industry, the fact that newspapers no longer were the "sole reservoir" of relevant experience, and the scarcity of available channels remaining open for new licensing. Without denigrating the contributions of newspaper owners to the development of broadcasting or suggesting that existing combinations were not serving the public interest, the Commission concluded that its rules should bar all new licensing that will not add to diversity. Since the prospective rules could foster diversity without the disruption that would attend dissolution of existing combinations, the Commission found no persuasive countervailing considerations that would require a less restrictive prospective rule.[32]

The rules operate this way: (1) a single party may not buy both parts of a co-located newspaper-broadcast combination; (2) if a broadcast licensee acquires a daily newspaper in the same market, it must dispose of its license within a year or by the time of its next renewal date, whichever comes later; and (3) no newspaper owner may obtain a license for a broadcast station in the same market, either by transfer or by original

[27] 50 FCC 2d at 1074–78 (App. 188–96).

[28] 50 FCC 2d at 1079 (App. 200).

[29] 50 FCC 2d at 1048, 1076 (App. 138–139, 193).

[30] 50 FCC 2d at 1076, 1078 (App. 193, 196–98).

[31] 50 FCC 2d at 1076 (App. 193).

[32] *Id.* The Commission did provide for waiver in exceptional circumstances. *Id.* at 1077 (App. 196).

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licensing.[53] The rules do not affect newspaper ownership of stations outside the community of publication.

B. EXISTING COMBINATIONS

The "most difficult" question for the agency was what to do about existing newspaper-broadcast combinations which had served the public well enough to obtain repeated license renewals and as to which the record contained no evidence of a pattern of abuse arising from cross-ownership.[54] In its *Further Notice*, the Commission had expressed its "substantial concern" that separation of existing newspaper-broadcast combinations might affect the quality of service "to be rendered by the individual units after divestiture. . . ." [55] Four years later, after considering the comments and studies it had received up to that time, the Commission asked for further comment and information on a number of questions, including:

> If divestiture is required, should it be required in all markets? Should it be limited to markets of a specified size, to those with a specified number of separate media voices, or to those with specific patterns of distribution of advertising revenues? Should it be otherwise tailored to respond to local variations which exist in different markets? [56]

The Commission was thus concerned that a sweeping divestiture rule might deprive the public of service by proven and conscientious licensees.

In the case of the prospective rule, the Commission enjoyed the luxury of pursuing the theoretical benefits of diversification of ownership singlemindedly. In the case of ordering divestiture of existing combinations, however, the Commission could not focus on the "abstract goal alone;" a "mere hoped for gain in diversity" was not enough.[57] This did not suggest a dimin-

[53] *Id.* at 1074–76, 1099–1107 (App. 188–93, 243–66).
[54] *Id.* at 1078–86, 1072–73 (App. 196–214, 186–88).
[55] 22 FCC 2d at 348 (App. 119).
[56] 45 FCC 2d at 769, 770 (App. 129–31).
[57] 50 FCC 2d at 1078 (App. 196–198).

ished importance for diversity; it simply meant that it was not the "only point to consider." [58] Since the extensive record did not disclose facts requiring divestiture by reason of any pattern of abuses arising from cross-ownerships, or otherwise, approaching the divestiture question became a matter of balancing various policy considerations. The benefits from diversification of ownership were only speculative, and therefore they had to be balanced against the disruption divestiture could cause, resulting in the loss of established owners who had offered a "long record of service to the public." [59] Risking disruption of service in the limited number of markets where there was no competition and no diversification was one thing; extending that risk across-the-board regardless of competition and diversity, the Commission concluded, was not warranted on the record and would cause serious public injury.[60]

In sum, the question as to existing combinations was different from the prospective one, in that there was no record of a pattern of abuse and substantial countervailing considerations had to be balanced against the potential gain in diversity from divestiture. The Commission decided that it could not justify across-the-board divestiture in those circumstances, and that its problem was to determine "how much diversity to seek in terms of providing the best practicable service to the American public." [61]

In the absence of a pattern of abuses, the Commission weighed two broad policy considerations which militated against across-the-board divestiture:

> 1. Possible diminution in the quality of broadcast service to the public as a result of:
>
> a. breaks in continuity of operation by licensees who had served their communities for a long time and were attuned to local needs and interests; [62]

[58] *Id.*
[59] *Id.*
[60] 50 FCC 2d at 1080 (App. 200–202).
[61] 50 FCC 2d at 1074, 1078–86 (App. 189–90, 196–213).
[62] *Id.* at 1078 (App. 197).

b. reductions in local ownership of broadcast stations; [43] and

c. possible local economic dislocations as a result of forced sales.[44]

2. Unfairness or hardship to individual licensees who had operated their stations well and were not shown to have abused their newspaper-broadcast operations.[45]

In view of the adverse considerations which could attend broad divestiture, the Commission chose to break up only those combinations which, in its view, constituted effective local monopolies.[46] Focusing on media that would deal with issues of local concern,[47] the Commission determined that it would require divestiture within five years (1) where the combination had the only local newspaper and the only radio station placing a city grade signal over the newspaper commu-

[43] A likely result of a broad divestiture order would have been "swaps" among cross-owners, resulting in absentee ownership of the stations that had been swapped. *Id.* at 1062–63, 1068–69 (App. 166–67, 178–79).

[44] *Id.* at 1078 (App. 197). The concern here was that sale of broadcast properties, even at prices that might be deflated somewhat by the "forced" divestiture, would be at such high prices that revenues which had been adequate in the past to support substantial investment in local programming and still produce a healthy return, might not even service the debt required to buy the stations. This might result either in a series of turnovers by owners who could not afford to take the loss, or in acquisition of many of the divested stations by conglomerates or other absentee owners. See Comments of American Newspaper Publishers Ass'n in Opposition, App. B, Study by Financial Consulting Unit of the First National City Bank.

[45] The Commission recognized that "it [was] not necessary to have proof of abuses" before it could require divestiture. 50 FCC 2d at 1080 n. 29 (App. 200–02). The absence of abuses, however, was a relevant consideration in striking the balance as the Commission did. *Id.* at 1089 (App. 219).

[46] The Commission also took into account the fact that cross-ownerships were declining both in absolute numbers and as a percentage of all stations. *Id.* at 1080 n. 29 (App. 200–02).

[47] National or regional magazines or newspapers, for example, even though they might circulate in the community, would not likely cover local issues. They were not considered in the determination of whether there were competing media voices. 50 FCC 2d at 1081–82 (App. 204–06).

nity (assuming no local television outlet), and (2) where the combination had the only local newspaper and the only television station placing a city grade signal over the newspaper community.[48] The divestiture order reaches seven television stations and nine radio stations.[49]

The co-located broadcast-newspaper combinations not subject to divestiture would still be subject to examination every three years at license renewal time to assure that they continue to operate in the public interest. The Commission, however, made plain in its order that it would not consider cross-ownership *per se* as an issue warranting a hearing on whether it should renew a license. Abuses of cross-ownership, such as economic monopolization or other conduct inimical to the public interest, still would be grounds for denial of a license renewal.[50]

On petitions for reconsideration, the Commission reaffirmed its rules and policies in all substantial respects.[51]

[48] The combination could sell either the paper or the station. A competing television station licensed to a community with a "monopoly" newspaper-radio combination would remove the requirement to divest, although communities with a single radio station are not likely to have television stations. A competing radio station in a "monopoly" newspaper-television community would not remove the divestiture requirement because of the obvious imbalance in influence and power between radio and television. *Id.* at 1080–84 (App. 202–10).

[49] *Id.*, Apps. D and E, at 1098 (App. 242).

[50] *Id.* at 1088–89 & n. 49 (App. 218–20).

[51] *Memorandum Opinion and Order*, 53 FCC 2d 589 (App. 317). While the Commission was considering cross-ownership, Congress was having hearings of its own on proposed legislation that included provisions dealing with newspaper-broadcast combinations. The House adopted legislation that would have forbidden the FCC from considering newspaper ownership at renewal time unless it had adopted rules addressing the matter. Both houses of Congress were aware of the FCC's proceeding. See *H.R. Rept. No. 93–961*, 93rd Cong., 2d Sess., March 26, 1974; *S. Rept. No. 93–1190*, 93rd Cong., 2d Sess., Sept. 27, 1974. See also *Congressional Quarterly Almanac* (Vol. XXX), pp. 714–17 (1974), for a summary of Congressional action on the legislation. Although Congress followed the Commission's proceeding closely, it took no action to change the result through legislation.

III. THE DECISION BELOW

Several parties sought review of the Commission's decision, attacking it from almost every conceivable point of view and challenging virtually every aspect of the new rules.[52] The court of appeals affirmed the prospective rules, holding (1) that a legislative type policy judgment intended to increase diversity was not arbitrary or capricious even though its benefits were speculative; [53] (2) that the Commission acted within its authority in restricting newspaper ownership of broadcast stations by rules; [54] and (3) that a rule forbidding the creation of co-located newspaper-broadcast combinations does not violate press freedoms guaranteed under the First Amendment.[55]

The court held further that the Commission had ample authority to require divestiture without evidentiary hearings on each license. It rejected the contention that divestiture was unfairly "retroactive," relying primarily upon the requirement in the Communications Act that licensees obtain renewals every three years. The court said that renewal applications were subject to the rules in effect at the time of renewal, so that the Commission could adopt rules that would affect future renewal actions on existing licenses. Thus, the court said,

> the contention that divestiture contains elements common to suspect retroactive legislation goes not to the existence of Commission authority, but rather to the reasonableness of its exercise.[56]

On the reasonableness of the specific divestiture rules adopted, however, the court's approach differed from that of the Commission. Although recognizing that the Commission had to rely primarily on policy considerations,[57] it overturned both the rules requiring divestiture in situations of effective

[52] The petitioners invoked the jurisdiction of the court of appeals pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).
[53] 555 F. 2d at 948–51 (App. 365–74).
[54] *Id.* at 951–52 (App. 374–81).
[55] *Id.* at 953–55 (App. 381–88).
[56] *Id.* at 955 (App. 390).
[57] *Id.* at 957 (App. 396).

monopoly and the determination not to require general divestiture of newspaper-broadcast combinations.[58]

The court of appeals held that the Commission had erred because, once having decided to promote diversity through its prospective rules, it had not also adopted an overall and virtually irrebuttable presumption that "cross-owned stations do not serve the public interest." [59] Although the court agreed with the Commission that the record, including the numerous studies, was inconclusive on the question of actual harm or abuses arising from cross-ownership,[60] it did not accept the Commission's balancing of other public interest factors against the "hoped for gain" in diversity. It held, rather, that the Commission "erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture." [61]

The court said (1) that the Commission "reasonably could have concluded . . . that a compelling factual showing [of harm from cross-ownership] was unlikely to be made;" [62] (2) that "the record no more establishes that cross-ownership serves the public interest than injures it;" [63] (3) that "it would have been rational for [the Commission] to conclude that divestiture was generally called for;" [64] and (4) that a policy requiring divestiture across the board would find support in the Communications Act, the First Amendment, and the Commission's long-standing policy of promoting diversity.[65]

Having found that a rule requiring across-the-board divestiture would have been "rational" and supportable, the court then concluded that a rule establishing a presumption of divestiture was "compelled." It held that the Commission had committed reversible error in not requiring breakup of all

[58] *Id.* at 956–66 (App. 394–430).
[59] *Id.* at 963 (App. 417).
[60] *Id.* at 956–57, 961 (App. 395–96, 411–13).
[61] *Id.* at 962 (App. 415–16).
[62] *Id.* at 961 (App. 412).
[63] *Id.* at 962 (App. 413).
[64] *Id.* at 962 (App. 414).
[65] *Id.* at 962–63 (App. 416–18).

251-094—77——4

cross-ownerships except those "where the evidence clearly discloses that cross-ownership is in the public interest." [66] The court also held that the requirement of divestiture in communities with effective local monopolies was arbitrary and capricious because it believed that the line the Commission had drawn was not rational. In order that "everyone would be consistently treated," the court directed the Commission on remand to adopt a rule, subject to waiver only in exceptional circumstances, requiring across-the-board divestiture.[67]

SUMMARY OF ARGUMENT

The Commission initiated the subject rule making proceeding in part to determine whether, notwithstanding the possible disruption in the provision of broadcast service which would result, it might be in the public interest to order across-the-board divestiture of existing co-located newspaper broadcast combinations. The record did not support this initial proposal, however. There was no indication that such combinations exercised undue influence, either economically or in the marketplace of ideas, nor was there evidence of a pattern of abuses arising out of cross-ownership. In fact, it appeared that the number of combinations had been declining steadily for two decades, and that most remaining commonly owned facilities were operated separately. Accordingly, the Commission concluded that the need for across-the-board divestiture had not been shown.

The Commission, which did order a limited amount of divestiture, might still have ordered broader divestiture in the hope of increasing diversity of expression; however, absent a showing of actual need, it determined that the possible benefits of such drastic action were outweighed by certain consequences which would adversely affect the provision of the best practicable service to the public. Mass divestiture would have caused breaks in the continuity of service upon which listeners and viewers had come to rely, might also have resulted in a reduction of local ownership and a decline in available working cap-

[66] *Id.* at 966 (App. 431).

[67] *Id.* at 966 (App. 429–30); Order granting partial stay of mandate, 555 F. 2d at 969–70 (App. 443).

ital, and would have been unfair to licensees who had served the public. For all these reasons, the Commission decided to "grandfather" most existing newspaper-broadcast combinations.

This decision was consistent with the Commission's previous actions in adopting various rules in furtherance of diversification of ownership, where divestiture has always been the exception rather than the rule. The Commission has also grandfathered when it has changed policy in other areas, such as cable regulation, and a similar approach has long been followed by other agencies and by the Congress. Moreover, grandfathering has been consistently approved by the courts, including this Court, as an appropriate response to the need to regulate for the future while at the same time satisfying the dictates of fairness.

Nevertheless, there were a few cases in which divestiture was warranted. In sixteen smaller markets, where the Commission found *prima facie* evidence that cross-owners had effective monopolies over local media, it required that (absent waiver) these combinations be broken up by 1980. The standard for determining if there was a monopoly was whether the only daily newspaper in a community was commonly owned with the only television station (or, if the community had no television station, the only radio station) placing a city grade signal over that community. The Commission determined that in such situations, where there was not even a single independently owned local media source to offer a significant juxtaposition of views and economic competition, no remedy other than divestiture was sufficient. This determination, too, was consistent with applicable judicial precedent.

* * * * *

The respective roles of agencies and reviewing courts have been clearly defined. It is the agency's function to weigh the relevant public interest factors involved in a decision, and the court may not substitute its judgment for that of the agency or dictate the result the agency must reach on remand. Here, however, the court did just that when it reversed the Commission for failing to order across-the-board divestiture and re-

manded the record "for adoption of a rule" compelling such divestiture. Moreover, the court took this action notwithstanding its awareness that divestiture had to be rationally based and its express recognition that the record was inconclusive so that the Commission necessarily had to rely primarily on policy considerations. The court claimed that the agency should have given controlling weight to a presumption that cross-owned stations do not serve the public interest, instead of relying on what the court deemed to be lesser policies unsupported by the record.

In spite of the court's assertions, however, there is no compelling presumption that cross-owned stations do not serve the public interest. To the contrary, the Commission, in seeking to insure the best practicable service to the public, has always taken into account, both in rule making and in adjudication, not only the hope for an increase in diversity, but also the need for continuity of service repeatedly found to have been in the public interest. Thus, the Commission did not rely here on "lesser policies", but on considerations which it has always treated as being of primary importance.

The court below was also mistaken in its contention that the Commission's decision lacked support in the record. Moreover, it is settled that an agency, in formulating rules, may look beyond the particular record of a proceeding in order to draw upon its expertise. Indeed, this is particularly appropriate where, as here, an agency is attempting to provide for the future, and the decision must rest primarily on policy rather than factual considerations.

The court also vacated the Commission's rules requiring divestiture in sixteen monopoly markets, arguing that although these markets admittedly contained fewer voices, they might in fact have no less diversity. But the assumption that there is a correlation between additional voices and greater diversity is the foundation of the Commission's multiple ownership policy and has been recognized as such by the courts. Indeed, in this proceeding the court below (1) upheld the Commission's prospective rules and (2) directed the agency to require across-the-board divestiture, because of this very assumption, as evidenced

by the court's recognition in both situations that there was no guarantee that these measures would increase diversity. These contradictory approaches make it clear that the court was not really testing the rationality of the Commission's decision, but was simply disagreeing with the particular policy balance struck by the agency.

In sum, the Commission acted reasonably in determining the extent to which a change in its long established policy concerning newspaper-broadcast cross-ownership was appropriate, and the decision of the court below ordering a more extensive change in this policy should be reversed.

ARGUMENT

I. THE DECISION OF THE COMMISSION NOT TO REQUIRE ACROSS-THE-BOARD DIVESTITURE OF EXISTING CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS WAS LAWFUL, RATIONAL, AND BASED ON A CONSIDERATION OF ALL THE RELEVANT PUBLIC INTEREST FACTORS

> Divestiture has a substantial impact, and should be required only when we can determine that it is required by the public interest. We agree that it is not necessary to have proof of abuses before we can act, and we recognize that trading of stations would tend to lessen concern based on financial losses or investment uncertainty. However, we do not think that these considerations are a substitute for the requirement of a stronger showing than we have of the need for such a severe remedy on a broader basis. Even if some disruption occurs, we have acted to divest where competition and diversity are absent. Extending this to apply to all newspaper-television combinations, regardless of competition is not warranted on the record before us and would cause serious public injury. . . . We have drawn a line that is based on competition as well as diversity of voices and our experience suggests that there is neither need nor wisdom in going beyond it. 50 FCC 2d at 1080, n. 29. (App. 200-202).

This quotation, from the Commission's *Second Report and Order*, summarizes the Commission's approach to the problem of divestiture in the context of newspaper-broadcast cross-

ownership. In the following discussion, we will show that the approach was rational, and that the court below failed to afford the Commission the discretion to which it is lawfully entitled in formulating broadcast policy.

A. THERE WAS NO RECORD OF HARM FROM EXISTING CROSS-OWNERSHIP

The Commission initiated the subject rule making proceeding in part to test the hypothesis that newspaper-broadcast cross-ownership presented a pervasive danger of insufficient diversity of viewpoints in the major mass media. By the close of the record in this nearly five-year long proceeding, however, it was clear that the initial hypothesis had not been substantiated by showings of actual harm. Although a great many comments and studies had been submitted, there was no showing that existing newspaper-broadcast combinations exercised undue influence either economically or in the marketplace of ideas. To the contrary, media concentration was declining, not growing. For more than 20 years, the number of broadcast stations co-owned and co-located with newspapers had been decreasing, both in absolute numbers and as a percentage of the total number of stations. The continuation of this trend was assured by the Commission's new rules, which prohibit not only the establishment of new cross-ownerships but also the transfer of any existing combination intact to a new owner. 50 F.C.C. 2d at 1080 n.29 (App. 200–202).

Nor was there any showing of a pattern of abuses arising out of cross-ownership. There was virtually no evidence whatever of abuse in the record.[68] Nor was any pattern of abuse suggested by extra-record submissions filed during the course of the rule making proceeding against individual cross-owners, including both petitions to deny and competing applications. The few allegations of abuse of which the Commission was aware, on or off the record, were so scattered, unspecific, and tenuous in their relationship to the fact of cross-ownership, that they provided no basis for a sweeping divestiture rule. Having now examined all such allegations filed in individual cases since the

[68] See 50 FCC 2d at 1072, 1085, 1089 (App. 186, 211, 219).

start of this proceeding in 1970, the Commission has found only one instance in which allegations of abuse against newspaper cross-owners proved sufficient to warrant a hearing.[69]

Far from finding indications that cross-owners tend to misuse their common ownership, the record indicated that cross-ownership presented a lesser threat to diversity than had been supposed. The Commission noted that it might have ordered broader divestiture if there had been substantial evidence that cross-owned media were being operated "monolithically" or were "speaking with one voice." 50 F.C.C. 2d at 1089 (App. 219). But the record indicated that most commonly owned newspapers and broadcast stations were operated seperately. The Commission concluded that, while such separate operation could not be equated with seperate ownership, it was nonetheless a factor to be considered in weighing the need for greater diversity. *Id.*

Despite the lack of evidence of harm, the Commission did determine that divestiture was warranted in a few cases where there was a *prima facie* showing of "effective monopoly" of major local media. *See* discussion at pp. 29–31, *infra*. Except in those situations, however, the Commission reasonably determined that there had been no showing of harm to the public interest requiring widespread divestiture of newspaper-broadcast combinations. The Commission recognized that it had the discretion to order greater divestiture in the hope of increasing diversity of expression in the media. 50 F.C.C. 2d at 1080 n.29 (App. 200–202). But absent a showing of need, it determined that the adverse consequences of such drastic action outweighed the possible benefit.

B. THERE WERE COUNTERVAILING FACTORS AFFECTING SERVICE TO THE PUBLIC WHICH WEIGHED AGAINST WIDESPREAD DIVESTITURE

1. Loss of continuity

As noted in the counterstatement (p. 5, *supra*), one of the Commission's "primary objectives" is the provision of the "best practicable service to the public." *Policy Statement on*

[69] *See WGAL Television, Inc.*, 62 FCC 2d 527 (1976).

Comparative Broadcast Hearings, *supra*, 1 F.C.C. 2d at 394; *Federal Communications Commission* v. *Sanders Bros. Radio Station*, *supra*, 309 U.S. at 475. The Commission has long taken the position that a policy of continuity furthers this objective, and thereby serves the public interest, by enabling licensees to establish permanent community ties and become familiar with the needs of their service areas. In fact, the Commission expects that licensees intend to continue in broadcasting in order to establish traditions of service and develop programming. Thus, it has formulated a rule against trafficking—the acquisition and sale of licenses to realize a quick profit—in order to protect the public from a break in the continuity of service it becomes accustomed to expect. 47 C.F.R. § 1.597. A broadcaster who engages in such conduct may be disqualified from later returning to the broadcast business. *Crowder* v. *Federal Communications Commission*, 399 F. 2d 569, 572 and n. 22 (D.C. Cir.), *cert. denied*, 393 U.S. 962 (1968)."[70]

These considerations formed the background for the agency's conclusion in this proceeding that "stability and continuity of ownership do serve important public purposes." 50 F.C.C. 2d at 1078 (App. 197). Newspaper-owned stations had established traditions of service, even before there was any assurance of profit, and had maintained these traditions, in some cases for decades. In fact, a careful study by the Commission's staff found that newspaper-owned stations even showed some superiority to other stations in several categories of local programming. 50 F.C.C. 2d at 1078 n. 26, 1096 (App. 198, 234). Divestiture introduced the danger of disrupting this proven, superior service—to the detriment of the public interest.

The concern for preserving continuity of service and avoiding disruption has long been an important factor in fashioning the Commission's multiple ownership rules. Generally, there-

[70] On the other hand, the Commission has not thought it wise to "lock in" for all time those who do not wish to continue in broadcasting. Accordingly, it permits licenses to be transferred or assigned after three years. Again, this is in furtherance of the goal of best practicable service to the public. The Commission believes that such service is not likely to be had from unwilling licensees.

fore, these rules have only applied prospectively, with little or no divestiture required. For example, the Commission's chain broadcasting regulations, promulgated in 1941, did not require radio networks to give up all their owned and operated stations. The Commission stated that it might have decided differently if this question had arisen before such ownerships had actually come into being. Under the circumstances, however, it ordered divestiture only where two AM stations were licensed to the same network in the same area, or where the available facilities were so few that the network had little if any competition. *Report on Chain Broadcasting* (Order No. 37, Docket No. 5060) (1941). In affirming the chain broadcasting rules, this Court expressly noted the Commission's reluctance to order more extensive divestiture."[71]

Similarly, when, in 1953, the Commission limited to seven, seven and five, respectively, the number of AM, FM and VHF-TV stations which could be under common control, it deliberately set these limits at a level that would not require extensive divestiture because it believed this would be "unduly disruptive." *Multiple Ownership Rules* (Docket No. 8967), *supra*, 18 FCC at 292. In the few instances where the limits were exceeded, divestiture was dealt with case by case. *Id.* at 295. When the 1953 ownership rules were judicially challenged, this Court upheld the Commission's authority to place limits on the number of commonly owned stations in the same service. *United States* v. *Storer Broadcasting Co.*, *supra*, 351 U.S. at 203. On remand to the District of Columbia Circuit, the specific limits established by the Commission were sustained on the ground that they were based on the Commission's experience, "coupled with a design to avoid undue disruption of existing station ownership." *Storer Broadcasting Co.* v. *United States*, *supra*, 240 F. 2d. at 56 & n. 3."[72]

[71] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 206-207 (1943).

[72] The Commission subsequently limited the total number of VHF and UHF television stations which could be under common ownership to seven. The limit of 5 VHF stations remained in force.

When the Commission first adopted rules which prohibited a single party from owning two or more AM stations in the same area, *Multiple Ownership of Standard Broadcast Stations*, *supra*, 8 Fed. Reg. 16065 (1943), approximately 20 existing combinations were required to divest. *FCC Eleventh Annual Report* (1946), p. 12. However, in 1964, when the Commission amended its rules to reflect stricter and more precise standards for determining prohibited overlaps in AM, FM and TV, no divestiture was required of the numerous existing combinations. *Multiple Ownership Rules* (Docket No. 14711), *supra*, 45 F.C.C. 1476. Nor did the Commission require divestiture when it adopted rules prohibiting common ownership of television and radio stations in the same market. *Multiple Ownership Rules* (Docket No. 18110), 22 F.C.C. 2d 306 (1970), *modified on other grounds*, 28 F.C.C. 2d 662 (1971).[13]

2. Reduced local ownership

Widespread divestiture also raised the possibility of reduced local ownership. At present, some 75% of all newspaper-broadcast combinations are locally owned.[14] It seemed probable to the Commission that if across-the-board divestiture were ordered, many sales would be to non-local interests, particularly if there were widespread "swapping" among those ordered to divest. This net loss of local owners, especially in view of their characteristic traditions of service to the community, was another factor which contributed to the Commission's ultimate decision, even though this consideration would not apply in every case.

3. Economic dislocation

Across-the-board divestiture also introduced certain economic considerations, arising from the much increased value of broadcast stations as well as the higher interest rates prevail-

[13] This decision not to require divestiture of existing radio-TV combinations was reaffirmed in the order now before the court. 50 FCC 2d at 1055 (App. 152). However, no party sought review of this aspect of the order.

[14] 555 F. 2d at 963–964 (App. 420–421).

ing in today's market. On the basis of the evidence submitted, the Commission concluded that the demand for equity capital to purchase broadcast properties might be so great as to lead to a reduction of the working capital which would otherwise be available for programming, including news and public affairs programming. The possibility of such diminution of service was relevant to the making of a public interest determination, and undercut any benefits associated with a mere hoped for gain in diversity. 50 F.C.C. 2d at 1068, 1078 (App. 178, 197). While the Commission did not suggest that this would in itself outweigh the benefits possibly to be derived from divestiture, it was one of several countervailing factors which could rationally be considered.

4. Unfairness to existing licensees

The Commission was also concerned with giving fair treatment to existing licensees whose broadcast service had consistently served the public interest. The Commission knew from its experience, and the record confirmed, that newspaper cross-owners typically had long-standing commitments to broadcasting in their communities.[15] In some cases, the commitment was even undertaken with the Commission's affirmative encouragement. Uprooting these owners from their chosen communities would work an inherent hardship, quite apart from any question of financial gain or loss. As the D.C. Circuit Court of Appeals has elsewhere recognized, existing licensees who have given good service have "legitimate renewal expectancies" which, at the very least, should not be destroyed without good cause. *Greater Boston Telecasting Corp.* v. *Federal Communications Commission*, 444 F. 2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Except in a very few cases where a newspaper-owned licensee was operating in a community where competition and diversity were absent the Commission did not find good cause in this proceeding to uproot existing licensees.

[15] See p. 24, *supra*.

C. GRANDFATHERING ROUTINELY ACCOMPANIES THE ADOPTION OF NEW POLICIES

The grandfathering of most existing newspaper-broadcast combinations, which was supported in this instance by the foregoing considerations, is a routine legislative and administrative practice, often followed without extensive discussion. The Commission has usually taken this approach in adopting its multiple ownership rules, ordering divestiture on only a few occasions. See discussion at pp. 24–26, *supra*. And there are several other policy areas where the Commission has applied its rules solely on a prospective basis. *See, e.g., FM Broadcast Rules,* 40 F.C.C. 720, 725–726 (1962) (existing "supermaximum" FM stations grandfathered); *Daytime Skywave Transmission Rules,* 18 Pike & Fischer Rad. Reg. 1845 (1959) (existing station interference grandfathered); *CATV Rules,* 2 F.C.C. 2d 725, 785 (1966) and 36 F.C.C. 2d 143 (1972) (existing "distant signals" on CATV systems grandfathered); *Telephone Terminal Equipment Rules,* 59 F.C.C. 2d 83 (1976) (existing types of terminal equipment grandfathered under registration program).

Grandfathering is also a customary procedure at other administrative agencies. At the Internal Revenue Service, for instance, new rules adverse to taxpayers are generally applied only prospectively. *Lesavoy Foundation* v. *Comm'r,* 238 F. 2d 589, 591 (3d Cir. 1956). The Food and Drug Administration has gone so far as to codify grandfathering as its general practice "unless . . . substantial public interest considerations preclude [it]." 21 C.F.R. § 10.90(b)(6). The Environmental Protection Agency has frequently refrained from applying its new and more stringent standards to existing facilities. *See, e.g., South Terminal Corp.* v. *Environmental Protection Agency,* 504 F. 2d 646, 674 (1st Cir. 1974) (parking garages); *Kennecott Copper Corp.* v. *Train,* 526 F. 2d 1149, 1152 and n.16 (9th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976) (smokestacks). So has the Consumer Product Safety Commission. 16 C.F.R. §§ 1201.1(b), 1207.2 (architectural glass; swimming pool slides).

Indeed, Congress has often grandfathered on an industry-wide basis when a new overall regulatory approach is being adopted. *See, e.g.,* Civil Aeronautics Act of 1938, 52 Stat. 973, 987–988 (existing air carriers entitled to certificates of public convenience and necessity absent proof that their prior service was inadequate); Motor Carrier Act of 1935, § 206, 49 Stat. 543 (existing motor carriers entitled to certificates if in "bona fide operation" as of a certain date).

The practice of grandfathering has been approved by this Court. In *United States* v. *Maher,* 307 U.S. 148, 153 (1939), it was stated that this practice permits decision makers to respond "to the felt need for regulating . . . through familiar administrative devices, while at the same time . . . satisf[ying] the dictates of fairness by affording sanction for enterprises theretofore established." And in *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 202 (1947), this Court indicated that it was desirable for agencies to develop policies in furtherance of a statutory mandate through the "quasi-legislative promulgation of rules to be applied in the future." [76]

D. DIVESTITURE WAS PROPERLY REQUIRED IN A LIMITED NUMBER OF CASES WHERE THERE WAS NO OTHER INDEPENDENTLY OWNED SIGNIFICANT LOCAL MEDIA SOURCE

As discussed above, the record compiled in this proceeding did not support the Commission's hypothesis that extensive divestiture of co-located newspaper-broadcast combinations was either necessary or desirable. However, in a few cases, where the Commission found *prima facie* evidence that a cross-owner had an "effective monopoly" of local media, 50 F.C.C. 2d at 1081 (App. 203), it required that cross-owner to sell one of its media interests by 1980 or (absent waiver) face non-renewal of its broadcast license.

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[76] The District of Columbia Circuit has also approved the principle of grandfathering in a case involving this Commission. *Buckeye Cablevision, Inc.* v. *Federal Communications Commission,* 387 F. 2d 220, 227–228 (1967), citing *United States* v. *Maher, supra.*

The Commission examined all known instances where communities were served by newspaper-broadcast combinations in order to determine whether there were some communities where there was no diversification and where, therefore, the common owner was likely to have a monopoly in the marketplace of ideas as well as economically. The key point was whether the local listeners or viewers could turn to at least one other competing station which could be expected to cover local news and provide programming on local needs and interests, or to one other daily newspaper.

Since the focus was on whether any other full-fledged choice existed, some standards had to be selected for determining whether other broadcast services available in a community were truly competitive so as to prevent a common owner from having a local monopoly. The Commission concluded that, generally, only a city grade signal—the most intense and proximate under its rules—would be adequate for making this determination.[77] Accordingly, if community X had a commonly owned radio station and sole daily newspaper, and no other city grade radio signal encompassed that community, the license for the radio station would not be renewed unless the newspaper were sold by 1980.[78] Similarly, if there were a lone daily newspaper co-owned and co-located with a television station, a sale by 1980 would be required unless a city grade television signal encompassed the community in which the daily news-

[77] This was not an arbitrary choice. The Commission has for many years required that a licensee place a city grade signal (also known as a "principal community contour") over the entire community that it is licensed to serve. 47 C.F.R. §§ 73.188, 73.315, 73.685. Although it is not possible to predict precisely the quality of a broadcast signal at any time over a particular location, the city grade standard offers the best possible assurance that a signal will be provided which is of sufficient intensity to render consistent and satisfactory service to the listening or viewing public. *See, e.g., Wheeling Antenna Co.* v. *United States*, 391 F. 2d 179, 181 (4th Cir. 1968).

[78] The rules, of course, permitted sale of the radio station; and if more than one broadcast facility were co-owned with the newspaper, only one of the stations would have to be sold. The one exception to the rules was where there was also a separately owned television station licensed to the community in question. In that case, no sale was required. 50 FCC 2d at 1084 (App. 209).

paper was published.[79] In all, sixteen combinations in as many communities met these criteria for divestiture.

As a result of the Commission's approach, the divestiture which was required involved concentrated ownership in the smaller, rather than the larger, more competitive markets. The Commission explained that it was in these smaller markets, where there were not even two signals to provide "an effective juxtaposing of views on local issues," 50 F.C.C. 2d at 1083 (App. 207), that no remedy other than divestiture was sufficient.

This divestiture standard was consistent with the observation of this Court that the statutory public interest standard might not be met when "the publisher of the sole newspaper in an area applie[d] for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *Radio Corp. of America, supra,* 358 U.S. at 351–352. The District of Columbia Circuit has also stated on at least two occasions that the need for diversity and the dangers of concentration of control are greater in smaller than in larger communities. *Greater Boston Television Corporation* v. *Federal Communications Commission, supra,* 444 F. 2d at 859–860; *Massachusetts Bay Telecasters* v. *Federal Communications Commission,* 261 F. 2d 55, 64–65 n. 24 (1958).

II. THE DECISION OF THE COURT OF APPEALS TO REQUIRE DIVESTITURE OF ALL EXISTING CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS WAS AN IMPROPER SUBSTITUTION OF THE COURT'S JUDGMENT FOR THAT OF THE AGENCY

The respective roles of administrative agencies and reviewing courts have been clearly and sharply defined by this Court. The

[79] The presence of a radio station in the same community would not, absent a waiver, exempt the newspaper-television monopoly owner from the mandatory sale requirement. The Commission stated that if the only television station casting a city grade signal over a community were commonly owned with that community's only daily newspaper, it would be unreasonable to assume that a radio station, even one located in the same community, could compete effectively against such a combination. The Commission noted that newspapers and television are the public's most relied upon sources of information.

agency's role is expansive; it is charged with assessing the relevant factual and policy considerations, "both existing and foreseeable," *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968), and with exercising the "power to weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974), citing *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 535–536 (1946). Put another way, it is the agency's function "not only to appraise the facts and draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945).

By contrast, in reviewing agency action, the court's only function is to determine whether the agency's decision is rational and based on consideration of the relevant factors. *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, 419 U.S. at 285. "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 792. It is settled that courts must affirm decisions with which they disagree so long as this test is met. *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F. 2d 1, 33–37 (D.C. Cir. 1976), citing *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, 419 U.S. at 290; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). That a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem [of deciding whether the public interest will be served] to the latter." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). And when an agency's decision is based primarily on

policy considerations, it is even more to be respected; in fact, it is "entitled to the greatest amount of weight by appellate courts." *Securities and Exchange Commission* v. *Chenery Corp.*, *supra*, 332 U.S. at 209. In short, "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, *supra*, 401 U.S. at 416.

In reviewing the Commission's order as it pertained to existing newspaper-broadcast combinations, the court below first stated that since "divestiture contains elements common to suspect retroactive legislation," the authority to invoke this remedy had to be reasonably exercised. 555 F. 2d at 955 (App. 390). The court then admitted that the record was "essentially inconclusive," 555 F. 2d at 962 (App. 414), and that, in reaching its decision, "the Commission necessarily had to rely primarily on policy, not factual considerations." *Id.* at 957 (App. 396). Moreover, the court was unable to deny that the Commission had followed a classic "balancing test" approach in evaluating these considerations, and it could not point to a single relevant consideration which the Commission had failed to take into account. Notwithstanding all this, and despite paying lip service to the concept of judicial restraint, *id.* at 956 (App. 394), the court reversed the Commission for declining to order across-the-board divestiture. The court accomplished this result, first, by professing to discover a "presumption" that "cross-owned stations do not serve the public interest," *id.* at 963 (App. 417), and, second, by insisting that "the Commission could not rationally conclude" that what the court described as "lesser policies, lacking support in the record," were sufficient to overcome this presumption. *Id.* at 965 (App. 427).

A. THERE IS NO PRESUMPTION THAT CROSS-OWNED STATIONS DO NOT SERVE THE PUBLIC INTEREST

As indicated *supra*, the court below compelled the Commission to order across-the-board divestiture largely because the agency had not given "controlling weight," 555 F. 2d 967 at 969

(App. 443) to the "presumption" that "cross-owned stations do not serve the public interest." 555 F. 2d at 963 (App. 417). The court's argument fails for the simplest of all possible reasons. There is no such presumption.

The court found three bases of "support" for its presumption.[50] The first was Section 303(g) of the Communications Act, 47 U.S.C. § 303(g), which empowers the Commission to "encourage the larger and more effective use of radio in the public interest." 555 F. 2d at 962–963 (App. 417). The Commission also found support for its multiple ownership rules in Section 303. 50 F.C.C. 2d at 1089 (App. 220). The Commission has never interpreted Section 303, however, to mean that "cross-owned stations do not serve the public interest," and the court cited no case, nor anything in the legislative history of the Act, which indicated that Section 303 mandated such an interpretation. The court therefore failed to observe the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381 (1969).

The court next contended that "[t]he policies of the First Amendment also support this presumption." 555 F. 2d at 963 (App. 417). The Commission, of course, has specifically stated that its multiple ownership policy is derived in part from First Amendment sources. 50 FCC 2d at 1048 (App. 139). But the Commission has never invoked the First Amendment in support of the proposition that cross-owned stations do not serve the public interest. Nor has Congress done so, and in evaluating First Amendment claims, courts "must afford great weight to the decisions of Congress and the experience of the Commission." *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973). Moreover, where,

[50] The court never explained how the presumption made the leap from being "supported", 555 F. 2d at 962–963 (App. 417), to being "compelled", *id.* at 966 (App. 431).

as here, there are "doubts as to the wisdom of mandating, rather than merely allowing" diversity of expression, "courts should [not] impose an inflexible response as a matter of constitutional law." *Public Interest Research Group* v. *Federal Communications Commission*, 522 F. 2d 1060, 1067 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) (fairness doctrine).

Lastly, the court found support for its presumption in "the Commission's longstanding policy . . . that diversification is of central importance." 555 F. 2d at 963 (App. 418). The Commission does have such a policy and has taken it into account both in licensing by adjudication and in adopting its multiple ownership rules. But it is not the Commission's view, as the court expressly recognized, 555 F. 2d at 963 (App. 418), that literally "nothing can be more important" than the maximum possible diversity. Rather, as demonstrated at pp. 24–26 *supra*, the Commission has always taken into account other considerations as well, particularly the need to insure continuity of existing service to avoid the disruption which might attend divestiture. Accordingly, the Commission, in rule making, has ordered relatively little divestiture of existing multiple owners [51]—just as, in adjudicating, it has repeatedly renewed

[51] This has long been recognized. In commenting on the multiple ownership rules as they existed in 1957, Dean Roscoe L. Barrow observed that: "Carried to their logical conclusion, the local ownership and maximum diversity policies would result in a 'one to a customer' limit to station ownership. However, the Commission has balanced these doctrines with that of favoring an applicant having a sound record of past performance, and with other doctrines. This equipoise of doctrines has resulted in the current multiple ownership rule under which a maximum of seven television stations may be licensed to the same interest." H.R. Rep. No. 1297, 35th Cong., 2d Sess. 558 (1957).

See also *Citizens Communications Center* v. *Federal Communications Commission*, 447 F. 2d 1201, 1212–14 nn. 33 & 36 (D.C. Cir. 1971), where, in another context, the court said that diversification was "a factor properly to be weighed and balanced with other important factors." *Cf. Fidelity Television, Inc.* v. *Federal Communications Commission*, 515 F. 2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

the licenses of multiple owners found to be operating in the public interest. Contrary to the assertion of the court below, therefore, consistency would *not* call for ordering divestiture absent a showing of greater public harm. 555 F. 2d at 963 (App. 418). The consistent approach was exactly that which the Commission chose.

Indeed, if the court below were right, and the Commission were compelled to act on the basis of a presumption that cross-owned stations do not serve the public interest, then the Commission has violated the Constitution, its enabling statute, or its own guiding principles every time it has renewed the license of a cross-owned station, or adopted a multiple ownership rule calling for less than total diversification. Such a proposition, of course, is absurd. Consistent and long-standing agency, judicial and Congressional actions belie such an interpretation.

And this is so, ultimately, because the presumption rests on an obvious fallacy. The court took as its propositions (1) that diversified ownership is in the public interest, and (2) that insofar as cross-ownership is permitted, it results in less diversity, and concluded therefrom that (3) cross-ownership is not in the public interest. But even if these propositions were correct (and the Commission did not find that the second proposition was necessarily correct), the court's syllogism is illogical, for "public policy is not like a single track where only one train can run at a time." *National Association of Independent Television Producers & Distributors* v. *Federal Communications Commission*, 516 F. 2d 526, 542 (2d Cir. 1975). Specifically, the court forgot that it is in the public interest not only to seek diversity, but also to insure the best practicable service to the listening and viewing audience—which latter objective may, in many cases, be achieved by permitting existing broadcasters, even cross-owners, to continue as licensees. Thus, the Commission was correct when it stated that its problem in this proceeding was deciding "how much diversity to seek in terms of

providing the best practicable service to the American public." 50 FCC 2d at 1074. (App. 189–190).[82]

B. THERE IS NO MERIT TO THE COURT'S ATTACK ON THE COMPETING VALUES ON WHICH THE COMMISSION RELIED

The court below also held that the Commission's decision not to require complete divestiture could not be "justified" by the "competing policies it offered," since these were "lesser policies, lacking support in the record." 555 F. 2d at 965 (App. 426–27). However, it was not the court's function, but the Commission's, to weigh the various policy considerations and determine which should control. See discussion at pp. 35–36, *supra*. Since the Commission did this, and adequately explained its conclusions, the court below should have had no reason but to affirm—particularly in light of its previous statement that it did not intend to "imping[e] at all upon the Commission's substantive discretion in weighing factors and granting licenses." *Citizens Communications Center* v. *Federal Communications Center, supra*, 447 F. 2d at 1213 n. 33. But instead, the court rebalanced the scales and assigned a lower value to the factors relied upon by the Commission, in order to reach the result which it, the court, preferred. This intrusion into the administrative decision making process should not be condoned by this Court.

Not only was the court's rebalancing impermissible, but its reasoning was faulty. Its major argument was that continuity,

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[82] The court also faulted the Commission for "never explain[ing] why it had abandoned the presumption suggested in the notice of proposed rulemaking." 555 F. 2d at 963 (App. 419). But there was no such "suggestion" in the *Further Notice*, which, while it did contemplate requiring across-the-board divestiture, 22 FCC 2d at 346 (App. 115–17), also expressed substantial concern for the disruption which might accompany such a hardship. *Id.* at 348 (App. 119). In any event, the *Further Notice* did not limit the Commission's options in formulating rules once comments were submitted. *Cf. Owensboro on the Air, Inc.* v. *United States*, 262 F. 2d 702, 708 (D.C. Cir. 1958); *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24, 28 (D.C. Cir. 1954). Indeed, the Administrative Procedure Act requires only that an agency explain the basis and purpose of rules actually adopted. 5 U.S.C. § 553.

local ownership, etc. had to be lesser concerns because they had not prevented the Commission from approving assignment and transfer applications. 555 F. 2d at 963–965 (App. 417–427). But if the Commission were to force broadcasters to stay in business against their will, the service provided under such circumstances, albeit continuous, might well not be worth preserving. Thus, the fact that the Commission approves assignments and transfers in no way undermines its decision to place a premium on the continuation of proven past service by those licensees who wish to remain in business.[83]

The court below was also mistaken when it asserted that the Commission policies militating against divestiture lacked "support in the record." 555 F. 2d at 965 (App. 427).[84] Moreover, its view appears to be that an administrative agency cannot rely upon general policies developed on the basis of its experience in administering its statute unless they are reestablished as sound in the immediate proceeding. This is contrary

[83] The court, in its attempt to promote diversity, tried to leave room for the continuing importance of the factor of minimizing disruption by asserting that "the new owners will become the beneficiaries of any unofficial policy of continuity" 555 F. 2d at 964 (App. 422). The Commission might have adopted what could be described as a one-time upheaval approach, but that did not afford the court the authority to impose a balance more nearly to its liking. *Permian Basin Area Rate Cases, supra.* Similarly, although local ownership without any participation in the operation of a station is given no credit in a comparative proceeding, it was not unreasonable for the Commission in a policy making context to take account of the intangible benefits of local ownership, a factor of even some importance in a comparative proceeding, 1 FCC 2d 393, 395–396. The court, however, preferred to speculate that local entrepreneurs would find broadcasting an attractive investment, and that, therefore, there would be no loss of local ownership. 555 F. 2d at 964 (App. 421).

[84] For example, many parties urged the Commission to consider the public interest benefits derived from the long meritorious service of newspaper owned stations. 50 FCC 2d at 1064, 1065, 1066–67, 1071, 1078 (App. 169–170, 171, 174–175, 183–184, 197–198). Similarly, there was record support for the Commission's conclusion that divestiture might have an adverse economic impact ultimately affecting the quality of program service. 50 FCC 2d at 1068 (App. 177–178).

to settled legal principles recognizing the advantage of encouraging an agency in rulemaking to "look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise." *Pacific Coast European Conference* v. *United States,* 350 F. 2d 197, 205 (9th Cir. 1965). *Cf. Securities and Exchange Commission* v. *Chenery Corp., supra,* 332 U.S. at 209. This ability is particularly useful where, as here, an agency is endeavoring to provide for the future: "[A] forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *Federal Power Commission* v. *Transcontinental Gas Corp.,* 365 U.S. 1, 29 (1961).

C. THERE IS NO IRRATIONALITY IN THE COMMISSION'S DIVESTITURE RULE

The court below, in addition to concluding that the Commission must adopt rules requiring all existing combinations to divest, also vacated the rules which the Commission had adopted requiring divestiture in sixteen monopoly markets. The court's stated reasons for taking the latter action are further instances of its unlawful substitution of judgment for that of the agency.

The court first took the view that "the record d[id] not support the conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets." 555 F. 2d at 966 (App. 429). But the Commission reached no such conclusion; to the contrary, it treated harm from divestiture as a constant in both classes of cases. Its decision to require the break up of monopoly cross-ownerships rested on its conclusion that in these cases, and these only, greater harm to the public would result if divestiture were *not* ordered. Thus, here too, as in its treatment of non-monopoly situations, the Commission followed the classic approach of balancing the relevant public interest considerations. The court below should not have rebalanced the scales to suit its own predilections. *Permian Basin Area Rate Cases, supra; Citizens To Preserve Overton Park, Inc.* v. *Volpe, supra; Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra.*

In finding the Commission's divestiture rule irrational, the court below also asserted that "[a]lthough the affected markets contain fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater." 555 F. 2d at 966 (App. 429). This statement, of course, is true, since additional voices do not *necessarily* increase diversity. But the *assumption* that there is a correlation between additional voices and diversity lies at the very heart of the Commission's multiple ownership policy, and the fact that the beneficial effects of this policy cannot be predicted with certainty has neither stopped the Commission from adopting rules nor, until now, prevented the courts from upholding them. *National Broadcasting Co.* v. *United States, supra; United States* v. *Storer, Broadcasting Co., supra.* "A statute is not invalid . . . because it may not succeed in bringing about the result it tends to produce." *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929). This principle is equally applicable to an administrative rule.

Indeed, in this very proceeding, the court below upheld the Commission's prospective rules notwithstanding its express recognition that there was "no guarantee" that these rules would increase diversity either. 555 F. 2d at 950 (App. 373), quoting *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 96 (1953) ("the possible benefits of competition do not lend themselves to detailed forecast"). And the lack of such a "guarantee" did not prevent the court from directing the Commission to enact rules ordering *all* existing combinations to divest. ("The gains in diversity . . . may be speculative, but . . .") 555 F. 2d at 965 (App. 426–427). The contradictions further highlight the court's usurpation of the Commission's policy making powers and make clear that the court simply disagreed with the particularized policy balance struck by the Commission.

The court's citation of *Melody Music* v. *Federal Communications Commission*, 345 F. 2d 730, 733 (D.C. Cir. 1965), is inapposite. That case held that the Commission could not justify disparate treatment of similarly situated applicants merely

by enumerating irrelevant factual differences between them. Here, the Commission adequately explained why the factual differences between the two groups of cross-owners warranted disparate treatment. Those required to divest enjoyed an effective monopoly of local media. Those not required to divest had no such monopoly. An additional local daily newspaper or comparable broadcast station in what would otherwise be a market with an effective local monopoly is both relevant and material. The existence of such an entity provides an inducement to competition economically as well as in the marketplace of ideas.

The court's final reason for vacating the Commission's divestiture rules was that limiting divestiture to small markets "squanders the opportunity" to act where divestiture "might do the most good," that is, "in the larger markets." 555 F. 2d at 966 (App. 430). This statement, in addition to being a patent substitution of judgment, *Citizens To Preserve Overton Park, Inc.* v. *Volpe, supra*, is in direct conflict with two prior opinions of the same court which upheld the Commission's view that it is the smaller rather than the larger markets which most likely suffer from a lack of diversity of views. *Greater Boston Television Corp.* v. *Federal Communications Commission, supra*, 444 F. 2d at 859–860; *Massachusetts Bay Telecasters* v. *Federal Communications Commission, supra*, 261 F. 2d at 64–65 n. 24. *Cf. Fidelity Television, Inc.* v. *Federal Communications Commission, supra*, 515 F. 2d at 701. And in any event, an administrative rule, like a statute, is not invalid simply because it "might have gone farther than it did." *Cf. Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966); *Roschen* v. *Ward, supra*, 279 U.S. at 339. Moreover, when the court suggested in this regard that diversity could be increased in smaller communities by dropping in additional stations, 555 F. 2d at 966 (App. 430), it violated the principle that it is an agency's prerogative to choose among remedies. *Federal Communications Commission* v. *WOKO, Inc., supra*, 329 U.S. at 229; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953);

Consolo v. *Federal Maritime Commission*, 383 U.S. 607, 620–621 (1966); *Greater Boston Television Corp.* v. *Federal Communications Commission, supra*, 444 F. 2d at 857.[85]

The court's vacation of the Commission's divestiture rules was an improper use of its limited power to review. In short, it was entirely reasonable for the Commission to conclude that there was a *prima facie* lack of diversity and economic competition in those markets where divestiture was ordered, so as to make that remedy appropriate.

III. THE DECISION OF THE COURT OF APPEALS TO REMAND THE RECORD TO THE COMMISSION "FOR ADOPTION OF A RULE" WAS A USURPATION OF AN ADMINISTRATIVE FUNCTION

Even assuming, *arguendo*, that the Commission's decision was somehow irrational, the judgment below should still be reversed, for when the court of appeals not only reversed the Commission but remanded the record to the Commission "for adoption of a rule" compelling across-the-board divestiture, 555 F. 2d at 967 (App. 431), it "overstepped the bounds of its reviewing authority," *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976), and "usurped an administrative function," *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). On remand the Commission might have formulated different rules or decided that no rule at all was appropriate in light of the court's legal interpretations. In foreclosing that option, the court committed plain error. It is well established that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co., supra* (citation omitted). *See also National Labor Relations Board* v. *Food Store Employees Union, Local 347*, 417 U.S. 1 (1974); *South Prairie Construction Co.* v. *Local 627, I.O.U.E.*, 425 U.S. 800 (1976).

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[85] In addition, the court's apparent endorsement of drop-ins is a further illustration of the self-contradictory nature of its analysis, for drop-ins are no more certain to produce diversity than is divestiture.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the order of the Commission affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE
FOR BROADCASTING,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERVENOR-PETITIONER, THE LOUISIANA TELEVISION BROADCASTING CORP.

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TABLE OF CONTENTS

	Page
OPENING STATEMENT	1
Opinions Below	2
Jurisdiction	3
Constitutional Provisions, Statutes and Regulations	3
Questions Presented	3
Statement of Facts	4
Argument	4
A. The Court of Appeals Has Usurped the FCC's Function by Compelling a Retroactive Ban on Cross-Ownership	4
B. The Rule Mandated by the Court Which Prohibits Existing Broadcasters From Publishing Daily Newspapers in Their Local Communities Abridges First Amendment Rights	9
CONCLUSION	14

TABLE OF CASES

Associated Press v. U.S., 326 U.S. 1 (1946)	13
Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D.C. Cir., 1967)	5
Carroll v. Princess Anne, 393 U.S. 175 (1968)	13

	Page
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)	6
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973)	12
Elrod v. Burns, 427 U.S. 347 (1976)	13
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	11, 13
National Broadcasting Co. v. U.S., 319 U.S. 190 (1943)	6, 7
Permian Basin Area Rate Case, 390 U.S. 747 (1969)	7
Perry v. Sindermann, 408 U.S. 593	10
SEC v. Chenery Corp., 332 U.S. 194 (1947)	5, 9
Timkin Roller Bearing Co. v. U.S., 341 U.S. 593 (1951)	12
U.S. v. Storer, 351 U.S. 192 (1955)	6
Watson v. Maryland, 218 U.S. 173 (1928)	5
5 USC § 706	3, 6

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BRIEF FOR INTERVENOR-PETITIONER, THE LOUISIANA TELEVISION BROADCASTING CORP.

OPENING STATEMENT

This matter comes before the Supreme Court on Petition for Certiorari from a decision of the United States Court of Appeals for the District of Columbia. That decision affirmed so much of a regulation adopted by the

Federal Communications Commission ("FCC") as prospectively bans the issuance of a new television license to any applicant who directly or indirectly owns, operates or controls a daily newspaper in the same community as the proposed broadcast facility. But, the Court of Appeals went further than this: it vacated the FCC regulation which "grandfathers" most existing cross-ownership situations in an Opinion which effectively compels the Commission to require divestiture in all existing cross-ownership situations.

Louisiana Television Broadcasting Corp. urgently submits that the decision below is infected with fundamental error both in its determination that the FCC's prospective cross-ownership ban is constitutional and lawful and, more particuarly, in its unprecedented and unwarranted action compelling the FCC to impose a retroactive ban upon virtually all existing cross-ownership relationships. We support the briefs submitted on behalf of petitioner, the National Association of Broadcasters, *et al.*, which are simultaneously being submitted to this Court, and we will not burden the Court with a detailed repetition of these arguments. Rather we confine this brief to two points which we submit bear particular emphasis.

Opinions Below

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reprinted at pages 1-60 of the Appendix to the Petition for Certiorari filed by the FCC (hereinafter cited as "Pet. App.") and is reported at 555 F.2d 938. The Court's Opinion on the Commission's Motion to Stay Mandate appears at Pet. App. 161-167 and is reported at 555 F.2d 967. The Orders of the FCC which are the subject of the Court of Appeals' Decision

are reported in the *Second Report and Order* of the FCC in Docket No. 18110, 50 FCC 2d 1046 (1975) and *Memorandum Opinion and Order on Reconsideration,* 53 FCC 2d 589 (1975) and may be found at Pet. App. 61-147 and Pet. App. 148-158, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on March 1, 1977. Petitions for Writs of Certiorari were filed in this and companion cases and granted by this Court on October 3, 1977 in an Order which consolidates this case with five other cases for review. As a party to the proceeding below, Louisiana Television Broadcasting Corp. is thus a party before this Court. This Court has jurisdiction pursuant to 28 USC Section 1254(1).

Constitutional Provisions, Statutes and Regulations

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

5 USC § 706, defining the scope of appellate review of agency action, is set forth as an appendix to the brief of the National Association of Broadcasters. The regulations adopted by the FCC constitute amendments to Section 73.35, 73.240 and 73.636 of the Commission's Rules and Regulations and are reprinted at Pet. App. 114-121.

Questions Presented

We have elected to confine this brief to two questions:

1. Whether the Court of Appeals erred in substituting its judgment for that of the FCC, compelling the agency

to adopt a presumption that no existing broadcast stations affiliated with a local newspaper is in the public interest and that all must be divested.

2. Whether an FCC rule mandated by the Court prohibiting existing broadcasters from publishing daily newspapers in their local communities abridges First Amendment rights.

Statement of Facts

We adopt the statement of the case set forth in the Brief of the National Association of Broadcasters.

Argument

The Court of Appeals Has Usurped the FCC's Function by Compelling a Retroactive Ban on Cross-Ownership

As others have persuasively argued before this Court, the FCC has neither the statutory nor constitutional authority to adopt a regulation banning newspaper-broadcaster co-location. In any event, the Court of Appeals' invention and application of a "presumption" against "grandfathering" of existing cross interests imposes an impermissible straightjacket on the FCC in excess of the Court's powers. If nothing else, this portion of the decision, we submit, must be reversed, and the Commission's determination with respect to grandfathering reinstated.

1. There can be no question that, in its decision to set aside the Commission's grandfathering rules, the Court of Appeals has taken the extraordinary step of substituting its own balancing of the competing policy considerations

for that of the FCC. The Court of Appeals conceded that the administrative record "was essentially inconclusive" on the issue whether preexisting cross-ownership serves or injures the public interest. (Pet. App., p. 49.) This equipoise of evidence itself constitutes a more than adequate basis for the Commission's decision not to change its policy with respect to preexisting co-located TV-newspaper ownership. That action accords with the recognized principle that when an agency proposes to depart from long established prior policy, the adoption of a "grandfather provision" is not merely appropriate but desirable. See, *e.g.*, *Watson v. Maryland*, 218 U.S. 173, 176-77 (1928); *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 228 (D.C. Cir., 1967.)

Further, the court below expressly conceded that the FCC *had* balanced the public benefits resulting from grandfathering against the benefits assumed to flow from compulsory divestiture of existing co-located interests, and *had* set forth the reasons underlying its determination to grandfather existing cross-ownership arrangments except in egregious cases. The Commission reasoned that the inconclusive need for divestiture is outweighed by the public harm – loss of local ownership, loss of continuity in operation and economic dislocations – which would result if universal divestiture were demanded. (Pet. App. 93-94.)

Thus, this is emphatically not a case in which the agency failed to articulate the reasons for its decision, as it is required to do under the *Chenery* principle. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Nor does the Court of Appeals so hold.

Instead, the Court of Appeals asserted that it found the balancing determination made by the agency unpersuasive.

It devised a new rule that there is "a presumption against cross-ownership." (Pet. App., pp. 56-57). This rule finds no support in the Communications Act or the prior pronouncements of the FCC and the Courts.[1] It asserted that the Commission "could not have rationally concluded" that grandfathering is warranted but that "precisely the *opposite presumption* is compelled and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." (Pet. App., pp. 56-60, emphasis added.) This constitutes a flat, unequivocal substitution by the Court of its own judgment as to the appropriate balance to be struck for that of the agency.

2. In so doing, the Court of Appeals far exceeded the scope of its powers. It is a fundamental principle that in reviewing agency actions, "the court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). At the very most, it is the Court's duty to insure that no errors of law have been committed and that the determination by the agency is supported by "substantial evidence." 5 USC 706. Indeed, in rulemaking proceedings such as the instant one, the Court's only duty is to assure itself that the procedures followed are fair, that the rule adopted is permitted by the organic act and that the agency result lies within the range of reasonableness. *Permian Basin Area Rate Case*, 390 U.S. 747 (1969). Certainly, it is plain that it is never the Court's responsibility – nor does it have the power – to replace the agency's determination "with one more nearly to its liking." *Permian Basin Area Rate Case, supra*, at 792 (1969).

[1] We may grant that diversification of ownership is a factor – indeed, an important factor – to be considered by the Commission under the public interest rubric of the Communications Act. But there is no word in the Act and there is no precedent to support the proposition that competition is or should be the sole factor governing Commission determinations. See, *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943). Still less is there any support for the proposition advanced by the Court that diversity of voices is so paramount as to require the extraordinary application of a retroactive remedy. Indeed, the cases hold otherwise. See, *e.g.*, *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 207 (1943); *U.S. v. Storer*, 351 U.S. 192 (1955).

These limitations upon the scope of judicial review are not matters of mere procedural or legal nicety. They go to the very heart of the administrative process. The FCC reached its reasoned and documented determination to grandfather most existing cross-ownership situations only after a five-year exhaustive study; and it is the FCC – not the Court – which has the responsibility for administration and application of the regulatory program. Certainly, more than the appellate court, the FCC's selection of remedies is therefore entitled to deference. It is exactly this expertise which the clear and careful limitations upon the scope of judicial review are intended to protect and preserve. *NBC v. U.S., supra.* The decision of the court below to compel universal divestiture – without regard to the record, or the FCC's accumulated experience – cannot be reconciled with these statements of the limitations on judicial review and the reasons which underlie them.

3. In simplest terms, then, the court below has set itself up as a super-agency. In so doing, it has foreclosed the FCC from exercising its expertise entirely: under the decision below, the FCC has only two choices, one of which is illogical, the other ephemeral. On remand, the

FCC may adopt retroactive regulations entailing wholesale disruption in patterns which have developed over the past 40 years. The Court of Appeals' suggestion that this is merely a "one-time" only disruption (Pet. App., p. 54) misses the mark. At the heart of the court's reasoning is the premise that, if the adoption of a prospective ban on cross-ownership is in furtherance of the public interest, it logically follows that the preservation of an existing cross-ownership interests is contrary to the public interest. If left undisturbed, the court's reasoning means that grandfathering is impermissible in all cases in which the FCC proposes to depart from an existing and long-established policy. Moreover, the court's reasoning involves a *non sequitur*: a retroactive ban involves considerations – exactly those relied upon by the FCC – which are wholly absent in the case of a prospective ban. It is more accurate to say that the Court of Appeals' decision is illogical, than to conclude, as the Court has, that the FCC "could not have rationally concluded" that grandfathering is in the public interest.

The second alternative course open to the Commission under the decision below is more theoretical than real. In theory, at least, the agency could, on remand, forebear from any regulation of cross-ownership, thereby satisfying the Court of Appeals' notion that each of the three separate categories of cross-owners be treated equally. In fact, this course is foreclosed by the court's opinion on the Motion to Stay Mandate. (Pet. App., pp. 161-67.) All other possiblities properly within the scope of agency, not judicial, authority – an advancement of additional explanations for the decisions, reopening for consideration of additional evidence – were equally withdrawn by the court. And, all this was done on the basis of a newly minted, judicially fashioned, statement of policy which

the FCC was ordered to follow – that there is a presumption in favor of diversity commanding the imposition of a retroactive ban. Even if the Court of Appeals' policy determination were logical and sound – and, as we have shown, it is not – the court cannot permissibly straightjacket the FCC's performance of its function in this fashion. *Chenery Corp., supra.*

For these reasons, we submit that the Court of Appeals' action vacating the grandfather provisions of the rules must be reversed and the Commission's determination in adopting that rule affirmed. The remedy chosen by the Commission – grandfathering – is clearly lawful; the FCC carefully considered the competing public interest considerations; and it thoroughly articulated the reasons for the remedy it had selected in its decision. All of this is conceded by the court, which simply replaced the Commission's judgment with its own. Under a proper view of the limits of judicial review, the FCC's determination to grandfather must be affirmed.

B. The Rule Mandated by the Court Which Prohibits Existing Broadcasters From Publishing Daily Newspapers in Their Local Communities Abridges First Amendment Rights.

We submit that, on the facts of this case, the Court of Appeals' determination to impose a retroactive ban on cross-ownership of television stations and newspapers cannot be squared with the dictates of the First Amendment. Others have argued persuasively before this Court that the entire regulatory program cannot be reconciled with the First Amendment's prohibition upon governmental control "abridging the freedom . . . of the press . . . ." This is so because the regulation impermissibly conditions the grant of a

broadcast license upon a forfeiture of the right to publish a local newspaper and, conversely, penalizes publication of a local newspaper by denying any opportunity to seek a broadcast license.

The infringement of First Amendment rights is, moreover, especially acute in the court-mandated retroactive application of the ban to existing cross-ownership interests. In those cases, the regulation constitutes more than a condition upon the exercise of protected speech: existing licensee-publishers will be affirmatively compelled to elect between one of two equally protected modes of expression!

In *Perry v. Sindermann*, 408 U.S. 593, this court squarely held that the government

> may not deny a benefit to a person on a basis that it infringes his constitutionally protected interests – especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. (*Id.* at 597.)

A fortiori, if the government cannot condition benefits upon the surrender of First Amendment rights, it cannot take the even more drastic step of compelling one who would exercise those rights to choose among them. Yet, that is precisely what the Court of Appeals has, by vacating the grandfather provision, decreed in this case.

Addressing the First Amendment implications of the regulatory program only in the context of the prospective ban, the Court of Appeals did not even consider the constitutional implications of its retroactive application of

the asserted presumption in favor of diversity. In any event, the Court of Appeals' attempt to justify the infringement upon a free press is unconvincing. It asserts that because the regulations are "an attempt to enhance the diversity of information heard by the public" (Pet. App. 32), they promote First Amendment values and are therefore constitutional. This is an exact repetition of the arguments advanced (and rejected by this Court) in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In *Tornillo*, this Court stated

> At each point the implementation of a remedy . . . necessarily calls for some mechanism [of enforcement] . . . . If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment. (Id. at 247.)

Manifestly, a regulation which compels an existing co-owner to make a choice between its television station and its local newspaper facially involves "governmental coercion." It thus brings about a direct "confrontation with the express provisions of the First Amendment." *Tornillo, supra.*

Equally baseless is the Court of Appeals' conclusion that because the regulations attach to ownership, they do not constitute a burden upon speech. (Pet. App., p. 32.) Rather, the regulations directly and purposefully prohibit continued local publication by an existing licensee or alternatively command silencing of its television station. They attach to the content of protected speech as directly as an outright prior restraint. See, *Tornillo, supra.*

At the heart of the Court of Appeals' conclusion that divestitute is a constitutionally appropriate remedy lies the thought that divestiture is the only means by which the

supposed social problems and potential for abuse of cross-ownership can be resolved. But, even without regard to considerations of free speech, this Court has observed, "Divestiture . . . is not to be used indiscriminately without regard to . . . whether other effective methods less harsh are available." (*Timkin Roller Bearing Co. v. U.S.*, 341 U.S. 593, 603 (1951). The Court of Appeals' asserts that divestitute is itself a less harsh remedy in this case because the alternative is a denial of license renewal (Pet. App. 35). This is simplistic. In both instances, the existing television licensee-newspaper publisher is compelled to abandon one mode of expression in order to preserve another. And, there is a manifest alternative, adopted by the Commission but rejected by the court – *i.e.*, grandfathering – which avoids the direct governmental compulsion to choose between two modes of protected speech.

The court has thus provoked a conflict with the principles of the First Amendment. It purports to do so in the name of the First Amendment and its "values." But, the Court of Appeals' motives and determination here are thus strikingly similar to its action, rejected by this Court, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). As the Supreme Court there observed, the "continuing search for means to achieve reasonable regulation compatible with the First Amendment" cannot be achieved by the adoption of remedies – a compulsory right of access or divestiture – which "freeze this necessarily dynamic process into a constitutional holding." *Id.* at 132.

This is most especially true where here, as in the Fairness Doctrine case, the remedy "is too radical a therapy for the ailment . . . complained of." *Id.* 327. The Court of Appeals has mandated this "radical therapy" in the

absence of any basis that an extreme sanction is necessary or will work to achieve the social objective of diversity upon which the sanction purports to be based. The judicially fashioned remedy of divestiture does not rest upon the type of evidence which would sustain a determination under the Sherman Act or even Section 7 of the Clayton Act. Rather, there is only the naked "presumption," fashioned by the court, and the invocation of reasoning, squarely rejected by this Court in *Tornillo*, to support direct governmental intervention restricting the exercise of the First Amendment rights of the press.

The Court of Appeals has thus committed fundamental error because it rests its result on constitutionally insufficient grounds. On the facts of this case, we submit the principle articulated in *Associated Press v. U.S.*, 326 U.S. 1 (1946) – that the First Amendment does not confer an immunity from laws of general applicability – simply is not on point. This Court need not here consider whether compulsory divestiture of a protected medium of expression may be reconciled with the principles of the First Amendment in the face of a "paramount" countervailing interests. *Elrod v. Burns*, 427 U.S. 347 (1976). In this case, no showing has been, nor can it be made that there is such a paramount need. Any action, this Court has said, which curtails freedom of speech and of the press "comes bearing a heavy burden against its constitutional validity" *Carroll v. Princess Anne*, 393 U.S. 175 (1968). Certainly, as between the presumption in favor of diversity, upon which the Court of Appeals' retroactive ban is based, and the presumed constitutional invalidity of a remedy – divestiture – which compels surrender of First Amendment rights, it is plainly the latter which must prevail.

CONCLUSION

For these reasons and for those stated in the briefs of other petitioners, it is respectfully submitted that the decision of the Court of Appeals should be reversed. There is neither statutory nor constitutional authority to support the regulations promulgated by the FCC in its Second Report and Order. There is, most certainly, neither statutory nor constitutional authority for the application of a retroactive ban mandated by the Court of Appeals.

Respectfully submitted,

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SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Questions Presented 2

Counterstatement of the Case 3

A. The FCC's Long-Standing Emphasis on Diversification of Ownership of the Media of Mass Communication 3

B. The 1970 Proceeding, Docket 18110 6

1. The Further Notice of Proposed Rulemaking 6

2. The Second Report and Order 8

3. Reconsideration 10

C. The Court of Appeals Decision 10

Summary of Argument 13

Argument 16

I.

The Court of Appeals Properly Upheld the Commission's Authority to Adopt a Rule Barring Future Acquisitions of Newspaper-Broadcast Combinations 16

A. Congress Has Given the Commission the Latitude and Authority to Consider Newspaper Ownership in Licensing Broadcast Stations 16

Page

B. The First Amendment Is Served Rather Than Abridged by a Content Neutral Rule Promoting Diversity of Information Sources to a Local Community 21

C. The Commission's Adoption of Its Prospective Ban Is a Reasonable Exercise of Its Discretion 23

II.

The Court of Appeals Correctly Found the Commission's Second Report Arbitrary in the Application of Its New Cross-Ownership Standards to Existing Combinations 26

A. The Commission Erred in Its Assessment of the Burden of Proof in This Proceeding 27

B. The Commission Did Not Adequately Explain Why Its Diversification Presumption in the Prospective Rules Was Denigrated When Applied to Most Existing Combinations 29

C. The Commission's Grounds for Preferring Grandfathering Interests of Existing Licensees Over the Public's Interest in Diversity Are Arbitrary and Unsupported by the Record 32

1. Local Ownership and Integration of Ownership and Management 32

2. Continuity of Operation 33

3. Economic Dislocation 37

4. Unfairness to Existing Licensees 39

Page

a. Divestiture Is Not Retroactive Rulemaking 39

b. Divestiture Is Not Severe or Harsh 42

5. Best Practicable Service 44

III.

The Commission's Standards for Divestiture and for Ad Hoc Challenge Are Irrational 45

A. The Standard for Divestiture 46

B. The Ad Hoc Standard 48

IV.

A Reviewing Court May Instruct an Agency on Remand Where Fairness and the Public Interest so Dictate 53

Conclusion 57

Appendix. 26 U.S.C. § 1071(a)(1970) ....App. p. 1

TABLE OF AUTHORITIES CITED

Cases — Page

Addison v. Holly Hill Co., 322 U.S. 607 (1944) 55, 56

Alianza Federal de Mercedes v. FCC, 539 F.2d 732 (D.C. Cir. 1976) 38

American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C.Cir. 1966) (en banc) 40, 41

Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945) 40

Associated Press v. United States, 52 F.Supp. 362 (S.D.N.Y. 1943), aff'd 326 U.S. 1 (1945) 3, 22, 28

Bilingual Bicultural Coalition on Mass Media v. FCC, 492 F.2d 656 (D.C. Cir. 1974) 27

Buckley v. Caleo, 424 U.S. 1 (1976) 21, 22, 24

California Citizens Band Ass'n v. United States, 375 F.2d 43 (9th Cir.), cert denied, 389 U.S. 844 (1967) 40

CBS v. Democratic National Committee, 412 U.S. 94 (1973) 3

Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971) 3, 24, 40

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 24

Crowder v. FCC, 399 F.2d 569 (D.C. Cir. 1968) .. 36

Clarksburg Publishing Co. v. FCC, 225 F.2d 511 (D.C. Cir. 1955) 3

Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C. Cir. 1974) 7, 8, 28

Page

F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 16, 40

FCC v. RCA Communications, Inc., 346 U.S. 86 (1953) 24

FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) 40

Fed. Radio Comm'n v. Nelson Bros., 289 U.S. 266 (1933) 40

FPC v. Texaco, 377 U.S. 33 (1964) 40

General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971) 3, 5, 54

Greater Boston Television Corp. v. FCC, 444 F.2d 841 (DC. Cir. 1970), cert. denied 403 U.S. 923 (1971) 6, 18

Grosjean v. American Press Co., 297 U.S. 233 (1936) 22

GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973) 17, 24

Guinn v. United States, 238 U.S. 347 (1914) 53

Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970) 7, 27, 34

Iacopi v. FCC, 451 F.2d 1142 (9th Cir. 1971) 5

Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968) 18, 57

Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950) 18, 23

McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956), cert. denied, 353 U.S. 918 (1957) 18

Page

Metropolitan Television Corp. v. FCC, 289 F.2d 874 (D.C. Cir. 1961) 5, 54

Miami Herald v. Tornillo, 418 U.S. 241 (1974) .. 22

Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974) 24

Mt. Mansfield Television, Inc. v. FCC, 422 F.2d 470 (2d Cir. 1971) 24

National Ass'n of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976) 54, 55, 56

National Black Media Coalition v. FCC, D.C. Cir. No. 77-1500 44

National Citizens Committee for Broadcasting v. FCC, D.C. Cir. No. 75-1933 (Sept. 22, 1975) 5

National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 54

NBC v. United States, 319 U.S. 219 (1943) 16, 21

New Orleans v. Dukes, 427 U.S. 297 (1974) 54

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) 44

Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) 56

Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972).. 23

Palko v. Connecticut, 302 U.S. 319 (1937) 29

Permian Basin Area Rate Cases, 390 U.S. 747 (1969) 18

Pikes Peak Broadcasting v. FCC, 422 F.2d 671 (D.C. Cir. 1969) 53

Page

Plains Radio Broadcasting Co. v. FCC, 175 F.2d 359 (D.C. Cir. 1949) 18

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 3, 21, 24, 28

Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir.), cert. denied 342 U.S. 830 (1951) 3

SEC v. Chenery Corp., 332 U.S. 194 (1947) 56

Secretary of Agriculture v. United States, 347 U.S. 645 (1954) 57

South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) 41, 54

Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972) 7

Transcontinent Television Corp. v. FCC, 308 F.2d 339 (D.C. Cir. 1962) 41

United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377 (1956) 47

United States v. E. I. DuPont de Nemours & Co., 366 U.S. 316 (1961) 43

United States v. Maher, 307 U.S. 148 (1939) 53

United States v. Midwest Video Corp., 406 U.S. 649 (1972) 17

United States v. Radio Corp. of America, 358 U.S. 334 (1959) 17

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 17, 18, 24

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 3, 4, 16, 40, 50

United States v. Wise, 370 U.S. 405 (1961) 19

Page

WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969) 50

WBEN, Inc. v. United States, 396 F.2d 601 (2d Cir. 1968) 40, 42

Williams v. Washington Metropolitan Area Transit Commission, 415 F.2d 922 (D.C. Cir. 1968) (en banc), cert. denied, 393 U.S. 1081 (1969) .. 56

WLVA, Inc. v. FCC, 459 F.2d 1286 (D.C. Cir. 1972) 35

Agency Decisions and Orders

A. H. Belo Corp., 46 F.C.C.2d 1075 (1974) 28

Amendment of Multiple Ownership Rules, 9 P&F Radio Reg. 1563 (1953) 4

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Page

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Page

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Page

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Section 2(a), 47 U.S.C. §152(a) (1970) 2

Section 4, 47 U.S.C. §154 (1970) 2

Section 301, 47 U.S.C. §301 (1970) 2, 40, 54

Section 303, 47 U.S.C. §303 (1970) 2, 16

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Section 307, 47 U.S.C. §307 (1970) 2, 40, 54

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Page

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United States Constitution, Amendment I 13, 21, 22, 23, 28, 29, 49, 53

United States Constitution, Amendment XIV 54

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IN THE

Supreme Court of the United States

October Term, 1977

Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, 76-1685

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Petitioners,

vs.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Brief of Respondent National Citizens Committee for Broadcasting.

OPINIONS BELOW.

The opinions of the Court of Appeals are reported at 555 F.2d 938 (D.C. Cir. 1977) (A. 339-444).[1] The opinions of the Federal Communications Commission (FCC) are reported at 50 F.C.C.2d 1046,[2] *reconsideration*, 53 F.C.C.2d 589 (1975) (A. 134-338).

[1] *National Citizens Committee for Broadcasting v. FCC* (hereafter, *NCCB*).

[2] Second Report and Order, *Multiple Ownership* (hereafter *Second Report*).

JURISDICTION.

This Court has jurisdiction under 28 U.S.C. §1254 (1), the Court having granted and consolidated the various petitions for a writ of certiorari in this review on October 3, 1977.

STATUTES INVOLVED.

Sections 2(a), 4(i), 4(j), 301, 303(g), 303(r), 307(a), 307(d), 309(a) and 309(d) of the Communications Act of 1934, 48 Stat. 1064, *as amended,* 47 U.S.C. §§152(a), 154(i), 154(j), 301, 303(g), 303(r), 307(a), 307(d), 309(a) and 309(d) (1970) are set forth in the Appendix. (A. 27-32).

In addition, Respondent sets forth Section 1071 of the Internal Revenue Code, 26 U.S.C. §1071, in the Appendix to this brief.

QUESTIONS PRESENTED.

Whether the Federal Communications Commission has the authority to adopt a general rule proscribing future licensing of broadcast stations to daily newspapers serving the same market.

Whether the Court of Appeals was correct in holding that the Commission acted arbitrarily and capriciously when it grandfathered most existing broadcast station-newspaper combinations.

Whether the Court of Appeals correctly concluded that the Commission acted arbitrarily in differentiating among licensees in setting the standard for divestiture of cross-owned media.

Whether the Court of Appeals acted reasonably when it ordered the Commission to take further steps to

ensure that everyone would be consistently treated under the general standard against cross-ownership adopted in the rulemaking proceeding.

COUNTERSTATEMENT OF THE CASE.

These cases present for review a decision of the United States Court of Appeals for the District of Columbia Circuit upholding that portion of the Federal Communications Commission's multiple ownership rules (47 C.F.R. §§73.35, 73.240 and 73.636 (1976)) that prohibit ownership between co-located broadcast stations and newspapers, and vacating that part of the rules which grandfathers all but 16 current licensees that are associated with co-located newspapers. The respondent, National Citizens Committee for Broadcasting, seeks affirmance.

A. The FCC's Long-Standing Emphasis on Diversification of Ownership of the Media of Mass Communication.

The Federal Communications Commission, with the guidance of this Court[3] and the courts of appeals,[4] has long recognized that in a licensing scheme where access by the public is necessarily limited, diversification of ownership of the media of mass communication

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[3] *E.g., United States v. Storer Broadcasting Co.,* 351 U.S. 192, 203-04 (1956); *Associated Press v. United States,* 326 U.S. 1, 20 (1945). *See also CBS v. Democratic National Committee,* 412 U.S. 94, 122 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969).

[4] *E.g., General Telephone Co. of the Southwest v. United States,* 449 F.2d 846, 857 (5th Cir. 1971); *Citizens Communications Center v. FCC,* 447 F.2d 1201, 1207, 1213-14, n. 36 (D.C. Cir. 1971); *Clarksburg Publishing Co. v. FCC,* 225 F.2d 511, 518-19 (D.C. Cir. 1955); *Scripps-Howard Radio, Inc. v. FCC,* 189 F.2d 677, 683 (D.C. Cir.), *cert. denied* 342 U.S. 830 (1951).

is a strong, if not primary licensing factor.[5] Thus the Commission adopted rules (1) in 1941 requiring NBC to divest one of its dual networks[6]; (2) in 1941-43 barring common ownership of two local broadcast stations of the same type (*e.g.*, only one AM radio license in a given market) and requiring divestiture within six months to conform to the new "duopoly" standard[7]; and (3) in 1953 specifying maximum numbers of TV, AM and FM stations allowed to be under common ownership nationally.[8]

As early as 1944 the Commission considered newspaper ownership to be a relevant factor in awarding licenses. Although it declined to adopt a rule generally barring newspaper ownership of a local station, the Commission stated its intention at that time not to grant licenses "to permit concentration of control in

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[5]*E.g., Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C.2d 393, 394 (1965) (hereafter, *1965 Policy Statement*). See also cases cited in the Court's decision below, *NCCB*, 555 F.2d at 948-49, nn. 26-27 (A. 336-68).

[6]*Report on Chain Broadcasting,* Docket 5060, May 1941, *affirmed, National Broadcasting Corp. v. United States,* 319 U.S. 190 (1943).

[7]*Duopoly Rules* 5 Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943). *See* 1945 F.C.C. Annual Report, at 12.

[8]*Amendment of the Multiple Ownership Rules,* 18 Fed. Reg. 7796 (1953), *affirmed United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956). Unlike the instant case, almost all licensees met this standard at the time it was adopted. Divestitures were thus considered on a case-by-base basis. *Amendment of Multiple Ownership Rules,* 9 P&F Radio Reg. 1563, 1572 (1953). According to one commentator, only two parties violated the new rule. They were each given three years to divest their excess stations. H. Howard, *Multiple Broadcast Ownership: Regulatory History,* 27 *FED. COM. B.J.* 1, 15 (1974).

the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee."[9]

When adopting ownership diversification rules, the Commission has regularly imposed divestiture remedies to achieve its policies.[10] Congress has not only specifically approved this practice but also fostered it. In reaction to the Commission's divestiture requirements in its 1943 AM duopoly rules, *supra*, n. 7, Congress amended the Internal Revenue Code in 1944 to authorize the FCC to grant special tax certificates. This allowed licensees who sold or exchanged their media properties in order to effectuate a change in a Commission ownership policy, to defer capital gains by treating the transactions as involuntary conversions.[11]

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[9]*Newspaper Ownership of Radio Stations,* 9 Fed. Reg. 702 (1944).

[10]In addition to the divestiture orders listed above, the Commission has required, for example, divestiture of syndication companies by networks, *see Iacopi v. FCC,* 451 F.2d 1142, 1147 (9th Cir. 1971); divestiture of cable television systems by telephone companies, *General Telephone Co. of the Southwest v. United States, supra,* n. 4; divestiture of cable television systems by television networks and by television licensees in the same market, *CATV,* Second Report and Order, 23 F.C.C.2d 816 (1970); 47 C.F.R. §76.501 (1975). *But see Cable Television Systems,* Second Report and Order, 55 F.C.C.2d 540 (1975), *appeal pending sub nom. National Citizens Committee for Broadcasting v. FCC,* D.C. Cir. No. 75-1933 (Sept. 22, 1975) (Amendment of divestiture requirement to conform to standards established in Docket 18110; case being held in abeyance pending this review). Also, the Commission has required divestiture by the networks of spot sales representation for their affiliates, *Metropolitan Television Corp. v. FCC,* 289 F.2d 874 (D.C. Cir. 1961).

[11]Revenue Act of 1943, §123, 58 Stat. 44 (Feb. 25, 1944), 26 U.S.C. §112(m); now 26 U.S.C. §1071. *See* H. Rep. No. 1079, 78th Cong., 2d Sess. (1944) at p. 50.

Subsequently, in the broadcast license renewal context, the Commission began in the 1960s to recognize that the diversification factor, even without proven abuses, may warrant loss[12] or divestiture[13] of license.

Seeking to consider the diversification issue on an industry-wide basis, however, the Commission in 1968 instituted a new rulemaking proceeding, Docket 18110, to revisit the question of local concentrations of control. *Multiple Ownership,* Notice, 33 Fed. Reg. 5315 (1968). In 1970, again "to promote maximum diversification of programming sources and viewpoints," *id.*, the Commission barred future creation or transfer of TV-radio (AM/FM) combinations. *Multiple Ownership,* First Report and Order, Docket 18110, 22 F.C.C. 2d 306 (1970) (A. 33) (hereafter, *First Report*). The Commission held to the view that "60 different licensees are more desirable than 50, and even that 51 are more desirable than 50." *Id.*, 22 F.C.C.2d at 311, ¶ 21. (A. 43).

B. The 1970 Proceeding, Docket 18110.

1. The Further Notice of Proposed Rulemaking.

Concurrently with its *First Report,* the Commission issued a Further Notice of Proposed Rulemaking, *Multiple Ownership,* Docket 18110, 22 F.C.C.2d 339

[12]*WHDH, Inc.*, 16 F.C.C.2d 1 (1969), *aff'd sub nom., Greater Boston Television Corp. v. FCC,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971) (TV license granted to competing applicant but case "sui generis" because renewal applicant had only a four month license). *See also Midwest Radio-Television, Inc.*, 16 F.C.C.2d 943, 18 F.C.C.2d 1011 (1969) (media concentration issue designated for hearing apart from questions of abuse), *deferred,* 24 F.C.C.2d 625 (1970).

[13]*Frontier Boradcasting Co.*, 21 F.C.C.2d 570 (1970), *dismissed for voluntary divestiture,* 35 F.C.C.2d 875 (1972).

(1970) (A. 101), proposing to require divestiture within five years of all existing newspaper-broadcast or television-radio combinations in a single market. Future creation or transfer of newspaper-broadcast combinations would also be barred, for, the Commission found, "[i]t has now become clear that the most significant aspect of the problem is the common control of television stations and newspapers of general circulation. . . . [T]he public looks primarily to these two sources for its news and information on public affairs." *Id.*, 22 F.C.C.2d at 344, ¶ 26 (A. 111).

As then Chairman Dean Burch described the matter in his concurring opinion:

> There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then is the guts of the matter. *Id.*, 22 F.C.C.2d at 350 (A. 124).

During the next five years, while the Commission considered the concentration question by rulemaking, it deferred specific license challenges based on undue concentration of control grounds to this proceeding.[14]

[14]*See, e.g., Columbus Broadcasting Coalition v. FCC,* 505 F.2d 320, 325 (D.C. Cir. 1974); *Stone v. FCC,* 466 F.2d 316, 331 (D.C. Cir. 1972); *Hale v. FCC,* 425 F.2d 556 (D.C. Cir. 1970); *Scripps-Howard Broadcasting Company,* 31 F.C.C.2d 1090 (1971); *Federation of Citizens Ass'ns (D.C.),* 21 F.C.C.2d 12 (1969). In *Hale, supra,* Judge Tamm concurred to note that Docket 18110 offered "some hope that the Commission will finally come to grips with the grave problem inherent in the rising concentration of ownership in the mass media. . . ." *Id.*, 425 F.2d at 566.

Indeed, the Commission even deferred such questions in ongoing adjudicatory hearings to this rulemaking.[15]

2. The Second Report and Order.

Finally, in 1975, after extensive rulemaking proceedings, and spurred by Congress and the courts,[16] the Commission issued its *Second Report, Multiple Ownership*, 50 F.C.C.2d 1046 (1975) (A. 134). The Commission prohibited the creation of future television-newspaper combinations in the same community. Even though it found the record inconclusive on the question of whether actual abuses stemmed from broadcast-newspaper cross-ownership, the Commission acted to increase the diversity of media voices.

The Commission also determined that divestiture was an appropriate remedy to implement its new standard, but applied it in only 16 of the nation's smallest markets, where one entity controlled an absolute monopoly over the local daily newspapers and broadcast stations. *Second Report*, 50 F.C.C.2d at 1081-82, ¶ 114, 1098 (A. 204-06, 242).

As long as the community had one other signal, however, the Commission grandfathered the existing media cross-owner from future license challenge. Renewal hearings on undue concentration of control issues

[15]*E.g., Chronicle Broadcasting Co.*, 40 F.C.C.2d 775, 796 (1973); *Midwest Radio-Television, Inc.*, 24 F.C.C.2d 625, 627 (1970).

[16]*See, e.g.*, H.R. 12993, 93d Cong., 2d Sess., March 28, 1974 (requiring FCC to resolve Docket 18110 within six months), H. Rep. No. 93-961, 93d Cong., 2d Sess. (hereafter, *House Report*) at p. 23; S. Rep. No. 93-1190, 93d Cong., 2d Sess. (hereafter *Senate Report*) at pp. 14-15, 22 (action required on Docket 18110 by end of calendar year); *Columbus Broadcasting Coalition v. FCC, supra*, n. 14, 505 F.2d at 330.

would thereafter be foreclosed unless economic monopolization under the Sherman Antitrust Act could be demonstrated. *Id.*, 50 F.C.C.2d at 1088 (A. 218).[17] With respect to divestiture, the Commission claimed that "local ownership," "continuity of operations," and "local economic dislocations" outweighed the suddenly "abstract," and "mere hoped for gain in diversity." *Second Report*, 50 F.C.C.2d at 1078 (A. 196-98).

The Commission noted, in addition, that all licensees who divested to meet the new standard, whether required to divest or not, would receive beneficial tax certificates under 26 U.S.C. §1071. *Id.*, 50 F.C.C.2d at 1085, n. 45 (A. 211).[18]

[17]Subsequent cases have shown that the Commission has not followed this extremely difficult standard. *E.g., WGAL-Television, Inc.*, 62 F.C.C.2d 527 (1976) (FCC refused to designate issue on economic monopolization since it had neither the expertise nor experience to enforce the antitrust laws). *See* decision below, *NCCB*, 555 F.2d at 966, n. 108 (A. 428-29).

[18]Of the seven Commissioners, six either concurred or dissented. Commissioners Lee, Reid, and Washburn concurred; Commissioners Hooks and Robinson concurred in part and dissented in part; and Commissioner Quello issued a separate statement which he did not characterize.

Commissioner Quello objected to the Commission's failure to adopt policies or rules requiring operational separation of commonly owned newspaper-broadcast combinations, and urged "extreme vigilance on a case-by-case basis." (A. 277). Commissioner Hooks joined him on this point, and also dissented in part because: "I cannot join my colleagues in limiting divestiture to pure monopoly instances while ignoring other circumstances where the problem could be as bad or worse." (A. 273).

Commissioner Robinson filed a comprehensive opinion arguing for a structural rather than a behavioral approach to concentration. He noted that the decisional standard of proof used by the Commission in evaluating the record reversed the traditional assumption "that a competitive, unconcentrated ownership structure is prima facie in the public interest" (A. 295). This, he argued, in essence approves "how some broadcasters regard their licenses as property," a view "simply at odds with our statute." (A. 296, n. 20).

3. Reconsideration.

On reconsideration, *Multiple Ownership*, 53 F.C.C. 2d 589 (1975) (A. 317) (hereafter, *Reconsideration*), the Commission rebuffed industry pleas to adopt no rules in this field and reiterated its belief in the guiding premise of the rule. It noted: "[W]e again must reject [the] argument that commonly owned media provide diversity. It is unrealistic to expect the same level of diversity as would be offered if the entities were under separate ownership." *Id.*, 53 F.C.C.2d at 592, n. 9 (A. 323).

But the Commission maintained diversity is primary only "when it can be achieved without hardship or disruption." *Id.* at 592, ¶ 8 (A. 324). For instance, the Commission stated that if any new "egregious situations" or effective monopolies should arise due to the loss of currently existing competitive services, those stations would not have to divest. *Id.*, 53 F.C.C.2d at 590-91 (A. 320).

C. The Court of Appeals Decision.

Upon appeals brought by NCCB, several licensees facing divestiture, the National Association of Broadcasters, and the American Newspaper Publishers Association, the Court of Appeals unanimously reversed the Commission (A. 339). It upheld the Commission's assertion of authority to act to increase diversity prospectively even though the Commission had found no established record of actual abuses flowing from cross-ownership. But the Court reversed the Commission's decision that such a record is necessary before divestiture of existing cross-ownerships could be ordered (A. 415-31). The Court examined the reasons put

forth by the Commission for this inconsistent position, and found them, upon thorough analysis of the record, to be invalid and unsupported by the record. As it later summarized:

> [W]e were faced with a situation in which the Commission had treated three indistinguishable groups very differently. Because of this, steps had to be taken to restore consistent administrative treatment. Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules, and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt, but which it had already indicated would be available with respect to the egregious 16). *NCCB*, 555 F.2d 967, 969-70 (A. 443).

The Court supported the above conclusion with the following analysis:

(1) The Commission had the authority to promulgate prospective rules prohibiting cross-ownership even though the record was inconclusive on the question of whether actual "abuses" flowed from newspaper-broadcast ownership. Its authority flows from long-established principles which indicate that the Commission could act to increase diversity of broadcast media. The Commission's action based on diversity is supported by the fact that the Commission had consistently

acted on diversity principles with the repeated support of the Supreme Court and the courts of appeals (A. 362-88).

(2) But contrary to these established principles favoring diversity, the Commission when it considered divestiture of presently co-located facilities insisted on the need for actual evidence of abuses. And while the Commission made reference to differentiating factors between present and future licensees, the Court found that the Commission had either no record support for them or the Commission had weighed them in a manner inconsistent with past practice. First, in this regard, the Court reviewed the Commission's consideration of harm to the public interest that might result from the reduction of the quality of broadcast programming if divestiture were ordered. Here the Court found that the Commission had found no basis in the record to support such a proposition. Next, the Court examined the competing policies that the Commission had asserted to support its shift of emphasis. These the Court found had in all instances in the past been given lesser weight than diversity. Moreover, the Court found that to weigh these new policies in the way the Commission had, would require "massive shifts" in Commission practice with respect to license transfers (A. 394-430).

(3) Finally, the Court held that there was no record evidence that justified the disparate treatment of the 16 "egregious" cases that were ordered to divest by the Commission (A. 430).

The Court concluded, 555 F.2d at 960 (A. 431) that:

> For these reasons expressed above, we believe the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.

SUMMARY OF ARGUMENT.

The Federal Communications Commission has broad authority under the Communications Act to prevent monopolization or concentration of control over the media of mass communications. The Commission's long-standing practice of considering newspaper ownership in determining qualifications for broadcast license applicants on an ad hoc basis has been consistently upheld by the courts.

Therefore, the FCC's adoption of a rule barring future acquisition of newspaper broadcast cross-ownerships in the same market is a reasonable exercise of the agency's authority. Indeed, Congress has recently expressed its condonance of the Commission's use of its rulemaking authority in this way. Structural diversification, furthermore, serves rather than abridges basic First Amendment principles.

While a federal agency has considerable discretion to apply its rules and policies as best meets the public interest, it is restricted from arbitrary and capricious rulemaking. A court of appeals' review of an agency rulemaking is narrow, but searching. Its determination as to whether an agency has support in the record for its reasoning is narrowly reviewed by this Court.

Although the Commission has consistently found diversification to be a primary licensing goal, it denigrated this factor without rational explanation, in considering whether to apply its new one-to-a-market policy to existing cross-owners. The Commission ignored its own presumptions and policies favoring diversification,

derived from the Communications Act, in placing a burden on the public to show tangible harm from such existing cross-ownerships before requiring divestiture. Furthermore, if it were necessary, the Commission had substantial evidence of tangible harm before it.

Contrary to the Commission's view, divestiture is not a harsh and severe remedy. Nor is it a retroactive rule, since it allows licensees ample time to comply with the policy in the future. In any event, broadcasters have no property right to their licenses, which last only three years. An applicant seeking renewal, therefore, is subject to the rules and policies extant at the time of renewal, not at the time of the original grant. And broadcasters have long been on notice of the Commission's intention to promote structural diversity.

The Commission claims that it applied a wholly different standard to existing operations because it feared that disruption to the industry might result and also because it wanted to assure the public of the best practicable service. However, diversity of ownership is one element of the "best practicable service" licensing goal, and the Commission has traditionally found other individual elements of that standard to be secondary to the primary goal of diversification. Certainly this is true for the elements of "local ownership," "continuity of operation" and "local economic dislocation." The Commission's speculations about harmful effects in these areas from divestiture are unjustified by reason or by the record.

There is no reason to believe that new owners would not provide equal or better local broadcast service, as well as greater diversity of information sources.

Moreover, licensees have ample time and special tax benefits which alleviate any legitimate concern over their private economic interest. The Commission's practice of approving scores of transfer applications each year, furthermore, demonstrates the fallacy of the Commission's concern for these makeweight arguments.

The line which the Commission drew to require divestiture by some but not all licensees is arbitrary and irrational. It supposedly requires divestiture by "effective monopolies," but uses a diversity-based rather than a monopoly-based criterion to determine whether concentration in a given locality meets that standard.

Conversely, in protecting existing licensees against petitions to deny based on concentration of control grounds, the Commission adopted a Sherman Act "economic monopolization" standard, which it has since admitted it is ill-equipped to administer. The Commission has no provision, furthermore, for considering divestiture on an ad hoc basis, and will not consider showings by petitioners that the underlying goals of the general policy, *viz.*, diversity and competition, would be served by divestiture rather than renewal of license.

In sum, this case is simply a court reversal of arbitrary and capricious action by a federal agency which has lost sight of its mandate to regulate in the public, not private, interest. The Court of Appeals properly reminded the agency of its own long-standing presumptions, and attendant burdens of proof. On remand, the Commission would retain discretion to adopt a rule which does not draw arbitrary lines aimed at protecting private interests at the expense of the public's.

ARGUMENT.

I.

THE COURT OF APPEALS PROPERLY UPHELD THE COMMISSION'S AUTHORITY TO ADOPT A RULE BARRING FUTURE ACQUISITIONS OF NEWSPAPER-BROADCAST COMBINATIONS.

A. Congress Has Given the Commission the Latitude and Authority to Consider Newspaper Ownership in Licensing Broadcast Stations.

This Court has consistently upheld the broad authority of the Federal Communications Commission to adopt regulations interpreting the Congressionally delegated standards of the "public interest, convenience and necessity."[19] The Commission's power under that standard, and its mandate generally to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. §303(g) (1970), allows the agency flexibility to adopt regulations to meet the "fluid and dynamic" qualities of broadcast regulation, including those relating to concentration of control over ownership of broadcast stations. *Id.* "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcast field." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

In *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956), the Court upheld the FCC's numerical limitation on the number of broadcast licenses one person could hold nationwide, stating:

> Congress sought to create regulation for public protection with careful provision to assure fair

[19] *NBC v. United States, supra,* n. 6, 319 U.S. at 219 (1943).

> opportunity for open competition in the use of broadcasting facilities. Accordingly, we cannot interpret §309(b) as barring rules that declare a present intent to limit the number of stations consistent with a permissible "concentration of control."

And in *United States v. Radio Corp. of America,* 358 U.S. 334, 351-52 (1959) the Court accepted the possibility that

> [A]ntitrust considerations alone would keep the statutory [licensing] standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities which, if granted, would give him a monopoly of that area's major media of mass communication.

More recently, this Court upheld the Commission's authority to regulate communications media ancillary to its authority over broadcasting even absent express provision in the Act.[20]

Accordingly, the Commission's general authority to take newspaper ownership into consideration in deter-

[20] *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Review of the Commission's attempted regulation of data processors in *GTE Service Corp. v. FCC,* 474 F.2d 724 (2d Cir. 1973) is not to the contrary (NAB Br. at 24-25). There the Commission's authority to regulate activities of communications common carriers in the computer field was upheld, but regulations directly controlling the computer industry were reversed as beyond the Commission's jurisdiction and intent. *Id.*, 474 F.2d at 733. The *GTE* Court specifically distinguished the newspaper-broadcast cross-ownership situation as within the agency's authority. *Id.*, 474 F.2d at 734. In the present case, the Commission is regulating qualifications for owning broadcast stations. It is not regulating newspapers. (A. 378, n. 41).

mining broadcast licensing qualifications is clear.[21] And as this Court has warned, courts should not interfere "in the absence of compelling evidence that such was Congress' intention * * * to prohibit administrative action imperative for the achievement of an agency's ultimate purposes." [22]

The American Newspaper Publishers Association (ANPA) and the National Association of Broadcasters (NAB), along with some *amici curiae*, argue that the Commission's expansive powers do not include the ability to bar newspapers from acquiring broadcast stations in the same locality. They base the argument on (1) a limited and selective review of subsequent Congressional statements, none of which resulted in an amendment to the Communications Act; (2) an opinion of one former FCC General Counsel in 1938, who was looking at a somewhat different question under different circumstances, and (3) dicta from a 1942 court of appeals decision. While the petitioners' arguments were extensively considered below and dismissed by the Court, *NCCB*, 555 F.2d at 947-54 (A. 362-88), the vigor with which the petitioners again assert various Congressional statements requires some

[21] *E.g., Greater Boston Television Corp. v. FCC, supra,* n. 12; *Joseph v. FCC,* 404 F.2d 207 (D.C. Cir. 1968); *McClatchy Broadcasting Co. v. FCC,* 239 F.2d 15 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 918 (1957); *Scripps-Howard Radio, Inc. v. FCC, supra,* n. 4; *Mansfield Journal Co. v. FCC,* 180 F.2d 28 (D.C. Cir. 1950); *Plains Radio Broadcasting Co. v. FCC,* 175 F.2d 359 (D.C. Cir. 1949); *Frontier Broadcasting Co., supra,* n. 13.

[22] *United States v. Southwestern Cable Co., supra,* n. 20, 392 U.S. at 177, *quoting Permian Basin Area Rate Cases,* 390 U.S. 747, 780 (1969).

exposition beyond the Court of Appeals review. *See also Second Report,* 50 F.C.C.2d at 1051-52 (A. 144-46).

ANPA, NAB and some of their *amici* cite various Congressional statements made between 1946 and 1952. They argue that Congress has expressed its intention that the FCC not "discriminate" against newspaper owners. They treat certain legislative statements as if legislation had in fact been adopted precluding FCC consideration of newspaper ownership in licensing broadcasters.

Neither the Commission[23] nor the Court of Appeals[24] was persuaded by Congress' inaction. Indeed, the Court noted that the general use of subsequent legislative activity is not useful to determine the meaning of the original statute, *citing United States v. Wise,* 370 U.S. 405, 411 (1961). *NCCB,* 555 F.2d at 952, n. 41 (A. 378).

Nevertheless, recent Congressional actions conclusively demonstrate Congressional concurrence with the Commission's view that it has statutory authority to bar newspaper ownership of co-located broadcast stations by the rule here in issue. During the pendency of this rulemaking, and at the instigation of the NAB and others,[25] both the House of Representatives and

[23] *Second Report,* 50 F.C.C.2d at 1051 (A. 144-45).

[24] *NCCB,* 555 F.2d at 952 (A. 378).

[25] *See, e.g.,* "NAB Presses Drive for Renewal Relief," *Broadcasting Magazine,* December 4, 1972 at 38; "Whitehead Bill Joins the Crowd Seeking to Ease Renewal Trauma," *Broadcasting Magazine,* January 1, 1973 at 24-25.

the Senate adopted bills expressing their intention that the FCC not consider cross-ownership at license renewal time unless the Commission adopted rules prohibiting such interests, and gave the renewal applicant a reasonable opportunity to divest to conform to the new rules.[26] The *House Report* quotes from the *Further Notice* in Docket 18110, ¶ 34 [A. 116], where the Commission proposed through rule to require divestiture of co-located commonly owned daily newspapers and broadcast stations. It then states that "if cross-ownership is to be prohibited or management or ownership structures or their composition are to be prescribed, it must be done by rules. . . ." *Id.* at 19. There can be little question that the House Committee viewed the Commission as having jurisdiction to act as it proposed in Docket 18110.

Similarly, in the *Senate Report,* the Committee referred to the Docket 18110 proposal to bar newspaper cross-ownership of broadcast stations, *id.* at 14, and concluded, "The Commission has rules regarding multiple ownership, and there appears to be no reason why rules regarding cross-ownership would not also be appropriate." *Id.* at 15. Both the House and Senate adopted measures to require the Commission, in view of its delay, to conclude Docket 18110 within a certain time period. *House Report, supra,* n. 16, at 25; *Senate Report, supra,* n. 16, at 14-15, 22; *Congressional Quarterly Almanac, supra,* n. 26, at pp. 714-17. However, conferees were never selected in the House, and the bills eventually died. *Id.* No member of the House or Senate Commerce Committees, however, expressed

[26]*Congressional Quarterly Almanac* (Vol. XXX), pp. 714-17 (1974), *House Report, supra,* n. 16, at pp. 18-19; *Senate Report, supra,* n. 16, at pp. 14-15.

the belief that the Commission did not have the authority to consider newspaper ownership of broadcast stations or to adopt the proposal in the *Further Notice* in Docket 18110.[27]

B. The First Amendment Is Served Rather Than Abridged by a Content Neutral Rule Promoting Diversity of Information Sources to a Local Community.

ANPA (Br. at 17-26) and the NAB (Br. at 25-37) argue, again, that their individual right to broadcast should prevail over the public's right to diversity of information sources. This is a tired argument, and one which this Court has rejected many times.

"No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Red Lion, supra,* n. 3, 395 U.S. at 389, *citing NBC v. United States, supra,* n. 6, 319 U.S. at 227. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.*, 395 U.S. at 390.

In upholding the FCC's Fairness Doctrine, then, the unanimous *Red Lion* Court conclusively established the validity of FCC regulations aimed at promoting diversity. And the Court in *Buckley v. Valeo,* 424 U.S. 1, 49, n. 55 (1976), reaffirmed this view where

[27]ANPA's argument in this Court to the effect that the FCC does not have authority to prohibit newspapers from becoming broadcast licensees is in direct contradiction to its position before the Commission that the Commission has denied newspaper ownership in a hearing setting in the past, and that rather than enact a rule, the Commission should continue to consider newspaper ownership on an ad hoc basis. *ANPA Comments,* Docket 18110 (A. 715-16). *See generally Reply Comments of Stephen R. Barnett* (A. 776 ff.).

it stated that "in contrast to the undeniable effect of . . . [unconstitutional campaign expenditure limitations], the presumed effect of the Fairness Doctrine is one of 'enhancing the volume and quality of coverage of public issues.' "

The Fairness Doctrine "may well mark the outer limits of a permissible diversification policy which relies on direct government control over the content of broadcast programs." *NCCB*, 555 F.2d at 950 (A. 371). But the structural ownership rules here under review are far less restrictive, from a First Amendment perspective, because they are totally content neutral. They do not ban, punish, or mandate what may be published or aired.[28]

The Commission's rules, moreover, do not restrict a licensee from publishing a newspaper. While it does not allow one making that choice to retain a broadcast license in the same locality, this is consistent with long-standing prohibitions against monopolization of the press (*Associated Press v. United States, supra*, n. 3, 326 U.S. at 20), and against domination of broadcast frequencies. Thus the Commission will not allow one entity to obtain two television licenses in the same locality; it can also refrain from issuing a broadcast

[28]This distinguishes the Commission's content neutral, structural diversity rules from the other major First Amendment cases cited by petitioners. Thus in *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936), the newspaper tax was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled. . . ." And in *Miami Herald v. Tornillo*, 418 U.S. 241, 251 (1974), the Court struck down a right of reply statute which exacted "a penalty on the basis of the content of a newspaper." The Court of Appeals, furthermore, pointed out that "[f]reedom of the press does not necessarily shield newspaper publishers from regulation that may make publication more difficult." *Id.* (A. 383).

station license to one who has a concentration of other media of mass communications.

Indeed, content neutral rules aimed at maximizing information sources and mass media in a particular locality further rather than abridge the goals of the First Amendment. In addition, in view of the Commission's need, at times, to investigate allegations of behavioral abuses of local cross-ownerships,[29] structural measures taken in advance to prevent the possibility of such abuses will also promote the public interest and the First Amendment.

C. The Commission's Adoption of Its Prospective Ban Is a Reasonable Exercise of Its Discretion.

In assessing whether or not the Commission was "arbitrary or capricious" in adopting a particular rule the courts of appeals have a narrow but searching

[29]*See Mansfield Journal Co. v. FCC, supra*, n.21, 180 F.2d at 35 ("the way the newspaper is operated in relation to other media of communication is material"). *See also Chronicle Broadcasting Co.*, 16 F.C.C.2d 882 (1969), *renewal granted*, 40 F.C.C.2d 775 (1973). As some have suggested, continued cross-ownerships may invite the government into the newsrooms of newspapers or broadcast stations in order to investigate legitimate claims, supported by extrinsic evidence, of news management, and other abuses contrary to the public interest. Oral Argument of then NCCB Counsel, Frank W. Lloyd (A. 925, 928-29); S. Barnett, "Cross-Ownership of Mass Media in the Same City." (*Barnett Report*) (A. 990, 1001-02, 1011-21, and articles cited therein).

Petitioners have suggested that the *Barnett Report* was not properly before the Court of Appeals because they allege it was not officially part of the record. Certainly the Commission had an opportunity to pass upon it, however, since Commissioners Hooks and Robinson each referred to it in their dissents. *Second Report*, 50 F.C.C.2d at 1108, 1120, n. 17 (A. 269, 293). This is sufficient to meet the statutory test of 47 U.S.C. §405. *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519, 523 (D.C. Cir. 1972). And as the Court of Appeals noted, "much of the report consists of discussion of cases in the public record. . . ." *NCCB*, 555 F.2d at 959, n. 71 (A. 403).

scope of review, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), while that of this Court is more narrow and circumscribed. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309 (1974).

The Commission need not await the feared result before acting to prevent the potential for abuses of concentrations of control over the mass media, and to foster diversity.[30]

The Commission has traditionally taken newspaper ownership into account in licensing broadcast stations,[31] and the present rule is a codification and extension of existing Commission practice. By adopting a rule, rather than continuing to proceed on an ad hoc basis, the Commission is protecting newspaper owners from investing in an operation where renewal expectancies may in some instances be outweighed at renewal time by the diversification factor. See *Citizens Communications Center v. FCC, supra*, 447 F.2d at 1213-14, n. 36 (1971).

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[30]*See, e.g., Buckley v. Valeo, supra*, 424 U.S. at 29, 49, n. 55, where the Court upheld a limitation on campaign contributions in part because of the potential for abuse, and alluded to the Fairness Doctrine's "presumed effect" to increase the total amount of speech. *Accord: Red Lion, supra*, n. 3, 395 U.S. at 393; *United States v. Southwestern Cable Co., supra*, 392 U.S. at 176-77 (Commission can plan in advance with cable television, instead of waiting to react to events); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953) ("the possible benefits of competition do not lend themselves to detailed forecast"); *GTE Service Corp. v. FCC, supra*, n. 20, 474 F.2d at 731 (certain prohibitions imposed against communications common carriers relating to data processing affirmed on "potential domination" rationale); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 487 (2d Cir. 1971) (primetime access rule affirmed on potential of curbing competitive restraints and network dominance in syndication); *First Report, supra*, 22 F.C.C.2d at 311, ¶ 20 (A. 43) ("remedial action need not await the feared result").

[31]*See supra*, n. 21.

Adoption of the rule based on the Commission's intent to foster diversity of expression, even without evidence of past abuses, is reasonable because the Commission has long presumed that "it is unrealistic to expect the same level of diversity [from commonly owned mass media entities] as would be offered if the entities were under separate ownership." *Reconsideration*, 53 F.C.C.2d at 592, n. 9 (A. 323). See also *Second Report*, 50 F.C.C.2d at 1050, ¶ 14 (A. 142) (need for diversified ownership). "[C]entralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable." *First Report*, 22 F.C.C.2d at 310, ¶ 17 (A. 41).

In sum, as the Court below held, "[t]he prospective ban is an attempt to promote diversity without government regulation or supervision over speech." *NCCB*, 555 F.2d at 950 (A. 373). The Court observed after reviewing the record here that although there is no guarantee that the prospective ban will increase diversity, this did not make the attempt irrational nor was it unreasonable for the Commission to license an independent new voice. *Id.* (A. 374). "The 'search for truth,'" the Court stated, "will be facilitated by government policy that encourages the maximum number of searchers." *Id.* at 951. (A. 374).

II.

THE COURT OF APPEALS CORRECTLY FOUND THE COMMISSION'S SECOND REPORT ARBITRARY IN THE APPLICATION OF ITS NEW CROSS-OWNERSHIP STANDARDS TO EXISTING COMBINATIONS.

Having found that the Commission was authorized and that it acted reasonably in applying its "duopoly" rules to local newspaper-broadcast cross-ownerships, the Court of Appeals then looked to whether the Commission's enforcement mechanism for applying the new standard to existing cross-ownerships was reasonable. For, while the Commission applied the standard to future acquisitions and certain small licensees who controlled absolute monopolies in their cities, it exempted and indeed immunized all other cross-ownerships in the country, regardless of the degree of concentration they held.

The Court thoroughly searched for a rational basis for the Commission's action, but found the record bare of factual support and the premise of its action unreasoned. The Commission argues that for existing combinations, other factors such as "best practicable service" and disruption to the industry and individual owners come into play. But as we demonstrate below, the Court correctly held that all of the Commission's fears of "harmful effects" from divestiture were groundless, its application of countervailing factors irrational, and that the Commission inexplicably abandoned its traditional presumption in favor of diversification of media outlets.

A. The Commission Erred in Its Assessment of the Burden of Proof in This Proceeding.

The Court of Appeals correctly held that the Commission erred in requiring the public to show evidence of tangible harm from cross-ownerships before requiring across the board divestiture.[32]

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[32]Moreover if such evidence were necessary, the Commission had sufficient evidence before it to act affirmatively on the divestiture issue. Contrary to the Commission's statements, there are numerous examples of detriments, including actionable abuses warranting a hearing on denial of license from co-located newspaper-broadcast cross-ownerships. *E.g., WGAL-Television, Inc., supra,* n. 17 (newspaper preference of TV station); *Western Connecticut Broadcasting Co.,* 47 F.C.C.2d 432, 433-35 (1974) (concentration extreme and possible discrimination against political candidates); *WPIX, Inc.,* 20 F.C.C.2d 298, 300 (1970) (news management, but no concentration of control issue designated); *Chronicle Broadcasting Co., supra,* n. 15 (news management); *Midwest Radio-Television, Inc., supra,* n. 12 (cross subsidizations); *WHDH, Inc., supra,* n. 12 (lack of editorializing).

In large part, however, any deficiencies that do exist in the record can be attributed to the Commission's unwillingness to examine such issues when they were presented in licensing and complaint proceedings. Instead, the Commission has for years deferred examination of actual evidence in deference to its overall examination of its policies carried on in this rulemaking. *See, supra,* nn. 14-15.

Furthermore, the Commission is very reluctant to designate allegations of abuse of a cross-ownership for hearing unless the case is well-established. Yet it is nearly impossible to meet the Commission's burden for hearing without discovery procedures, which, in Catch 22 fashion, are not available until a case is set for hearing. *See, e.g., Bilingual Bicultural Coaltion on Mass Media v. FCC,* 492 F.2d 656, 659 (D.C. Cir. 1974); *Hale v. FCC, supra,* n. 14, 425 F.2d at 566 (Tamm, *concurring*).

There were, in addition, many allegations in individual cases before the Commission which, while perhaps not warranting a renewal hearing in every case, nonetheless offered the Commission the opportunity, had it been truly interested, to pursue the matter in rulemaking. These include allegations raised in *Newhouse Broadcasting Corp. (WAPI-TV),* 59 F.C.C.2d 218, 231-39 (1976); *Daily Telegraph Printing Co.,* 59 F.C.C.2d 185 (1976); *McPherson Broadcasting Co.,* 54 F.C.C.2d 565

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By placing the burden on those who sought diversification over concentration, the Court found, the Commission had acted in a manner contrary to the general presumption that precipitated the rulemaking and ultimately the prohibition against future cross-ownerships: namely that the Communications Act,[33] the First Amendment,[34] and the Commission's long-standing

(1975); *A. H. Belo Corp.*, 46 F.C.C.2d 1075, 1081-88, 1091 (1974); *RadiOhio, Inc.*, 38 F.C.C.2d 721, 751 (1975) (Johnson, *dissenting*), *aff'd sub nom. Columbus Broadcasting Coalition v. FCC, supra*, n. 14. *See* Johnson & Dystel, *A Day In The Life: The Federal Communications Commission*, 82 *YALE L. J.* 1575, 1607 (1973).

In addition, Professor Steven Barnett's extensive documentation in "Cross Ownership of Mass Media in the Same City" (A. 990-1051), lists many instances from public records of non-coverage, non-editorializing, news management to favor business interests, economic tie-ins between newspaper and broadcast station advertising, and the like. Also, the Commission heard personal testimony at oral argument as to the detrimental effects of cross-ownerships in several cities. (A. 923, 933-42). *See generally*, Commissioner Robinson's dissent at A. 291.

The Commission's Conglomerate Study Report might also have contained important information. Although the pilot study did reveal abuses, *see* Green, "Conglomerate Broadcasters Are Faulted in FCC Pilot Study, Wider Inquiry Slated," *Wall Street Journal*, August 11, 1970, p. 32, the Commission has refused to reveal large sections of its final report. *National Citizens Committee for Broadcasting*, 56 F.C.C.2d 476 (1975), 57 F.C.C.2d 1060 (1976).

Finally, the Commission has recently designated an "undue concentration of control" issue in a comparative renewal proceeding, based on the grandfathered renewal applicant's proposed extension of its service, citing the "duopoly" policy as of "overriding decisional significance" and expressing "concern for diversity and competition." *McClatchy Newspapers*, 40 P&F Radio Reg. 2d 1393, 1403-04 (1977).

[33]*E.g.*, 47 U.S.C. §303(g) (1970) obligates the Commission to "encourage the larger and more effect use of radio in the public interest." *NCCB*, 555 F.2d at 962-63. (A. 417).

[34]*E.g.*, "The First Amendment 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues. . . .'" *NCCB*, 555 F.2d at 963 (A. 417-18), *citing Associated Press v. United States*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), *aff'd* 326 U.S. 1 (1945). *See also Red Lion, supra*, n. 3, 395 U.S. at 390.

policy[35] favored diversification.[36] Once the Commission adopted the general proposition, the Court held, consistency required that the burden should properly have shifted to the cross-owners to demonstrate why their concentrations serve the "public interest, convenience and necessity." 47 U.S.C. §309 (1970). Instead, the Commission deferred to the private economic interests of the licensee over diversity and competition in the media.

The Court's view is, we submit, beyond cavil, for if the First Amendment is truly "the matrix, the indispensable condition, of nearly every other form of freedom,"[37] then the Commission's presumption for diversity, contained in the first 107 paragraphs of the *Second Report* should have been applied for all cross-ownership situations, absent a valid and reasonable basis for distinction.

B. The Commission Did Not Adequately Explain Why Its Diversification Presumption in the Prospective Rules Was Denigrated When Applied to Most Existing Combinations.

As detailed above, the FCC has established that separate ownership of a daily newspaper and a broadcast station in the same market is required in the public interest. The Commission articulated its rationale as follows:

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[35]The Court cited numerous such pronouncements at 555 F.2d at 944-45, nn. 6-9 (A. 350-52).

[36]Moreover, while the Court found the record inconclusive for both sides, it suggested that a compelling factual showing of a pattern of abuses was unlikely, if not impossible. *NCCB, supra*, 555 F.2d at 961 (A. 412-13).

[37]*Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

> If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. . . . [I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run. *Second Report,* 50 F.C.C.2d at 1079-80, ¶ 111 (A. 200).

In part this was based on the Commission's specific finding that newspapers and television stations are a community's principal source of information on local issues. *Id.* at 1083, ¶ 115 (A. 207-08).[38]

Additionally, the Commission stated that it believed that "the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility" (¶ 111; A. 200). The Commission even announced a policy of awarding tax certificates to licensees "in non-divestiture cases where current combinations are sold to separate owners in order to come into compliance with the new [anti-cross-ownership] policy underlying the rule." *Id.,* 50 F.C.C.2d at 1085, n. 45 (A. 211). The Commission could not have adopted this stance if the general policy had not been to declare cross-ownership as contrary to the public interest. *Tax Certificates,* 19 P&F Radio Reg. 2d 1831, 1832 (1970).

[38] *See also* the *Further Notice* in 18110:

> In view of the primary position of the daily newspaper of general circulation and the television broadcast station as sources of news and other information, and discussion of public affairs, particularly with respect to local matters, *it is not desirable that these two organs of mass communication should be under the same control in any community.* A direct parallel would be the ownership of two television stations in the same community by the same person, which the Commission without substantial disagreement from any source, has never permitted. *The functions of newspapers and television stations as journalists are so similar that their joint ownership is, in this respect, essentially the same as the joint ownership of two television stations.* 22 F.C.C.2d 339, 346 (1970) (emphasis added). (A. 115).

See also U.S. News and World Report, April 18, 1977, p. 36, where decisionmakers placed television second and newspapers tenth of all national institutions in terms of influence.

Yet the Commission refused to require that its policy be implemented by existing combinations. Instead, without evidence to support a view contrary to the one stated above, it held diversity to be "abstract" and "a mere hoped for gain." *Id.,* 50 F.C.C.2d at 1078 (A. 197-98). Moreover, it never explained this discrepancy, except to refer to the other factors—basically the Commission's speculation as to "the possibility of disruption for the industry and hardship for individual owners" from divestiture—which it believed outweighed the diversification criterion. But the other factors do not explain why diversity would be abstract in the context of present combinations. In fact, divestiture would result in a direct, real and obvious gain in diversity.[39]

[39] For instance, in Washington, D.C., recently announced divestitures by the *Washington Star* and the *Post* of their television licenses will result in six instead of four owners of major daily newspapers and VHF television stations in the market. See "WMAL-TV Fetches $100 Million, Trading Record," *Broadcasting Magazine,* April 4, 1977, p. 28, and "Two More Cross-Owners Go Thataway," *Broadcasting Magazine,* December 12, 1977, p. 19. Both of the divestitures are still subject to FCC approval.

C. The Commission's Grounds for Preferring Grandfathering Interests of Existing Licensees Over the Public's Interest in Diversity Are Arbitrary and Unsupported by the Record.

Basically, this appeal comes down to whether the Court of Appeals reasonably found that the Commission lacked record support for its fears of harmful effects of divestiture as weighed against the presumed benefits. Without reasoned analysis or record support in this proceeding, the Commission determined that the possible losses of "continuity of ownership," "local ownership" and "local economic dislocations" outweighed the public interest mandate for diversity. *Second Report, supra,* 50 F.C.C.2d at 1078, ¶ 108 (A. 197). The Commission's decision, when viewed against prior decisions, policies, and the inconclusive facts of record, is clearly arbitrary.

1. Local Ownership and Integration of Ownership and Management.

Although the Commission cites the fact that approximately 75% of newspaper-television cross-owners are locally owned, it did not indicate how many and to what degree local owners participated in the actual operation of the stations.[40] The Commission has traditionally discounted local ownership as a positive factor to the extent that the ownership did not participate in the day-to-day operation of the station. *1965 Policy Statement, supra,* 1 F.C.C.2d at 395. Furthermore, the Commission did not consider whether local ownership is necessarily a positive factor in a cross-ownership situation.[41]

[40]The great majority of licensees claimed that their newspapers and TV stations were operated separately. "Were it otherwise [the Commission commented] and the two operated jointly, it might have been necessary for the Commission to act to require divestiture in many more situations." *Id.* at 1089, ¶ 131 (A. 219).

In fact, the Court noted that the Commission routinely approves voluntary sales to distant, absentee buyers. Indeed, the Commission's primary policy in Docket 18110 was to bar local newspapers from acquiring local television licenses because diversity was found to outweigh local ownership. And certainly there was no reason to grandfather absentee owners on the basis that other cross-owners were local owners. The Commission appears to concede this in admitting that this consideration "would not apply in every case." (FCC Br. at 26).

Finally, as the Court of Appeals pointed out, about one quarter of the cross-owned licensees are themselves absentee owners, so divestiture could improve those situations. "[T]here is no reason to suppose that local entrepreneurs will not find television an attractive investment." *NCCB,* 555 F.2d at 964. (A. 421).

2. Continuity of Operation.

The Commission stated that divestiture might disturb "continuity of operation . . . as the new owner would lack the knowledge of the community and would have

[41]*See e.g., W. T. GORMLEY, JR., THE EFFECTS OF NEWSPAPER-TELEVISION CROSS-OWNERSHIP ON NEWS HOMOGENEITY,* (Univ. of North Carolina, *Chaptel Hill* (1976) at 214-15. Professor Gormley observes that local cross-ownerships involve a greater tendency of news overlap and therefore less actual diversity, as employees would perceive the owner's interests and pursue them. His findings include (1) 9.3% of television stations owned by a newspaper receive carbons of the latter's stories on an exclusive basis as opposed to 1.1% of comparable non-affiliated television stations; (2) cross-ownership increased news story overlap by 16.7%; and (3) 52% of the cross-owned television stations never editorialize, as opposed to 25% of non-affiliated stations. *Id.* at pp. 112, 210-12.

to begin raw." *Second Report*. 50 F.C.C.2d at 1078. (A. 197).[42] But as Commissioner Robinson pointed out, holdovers in high-level management often smooth the transition period (*id.* at 1128; A. 309), even assuming some unusual disruption from divestiture. Further, 79 television divestitures over a five-year period, for example, simply do not constitute disruptions inconsistent with the public interest. If they did, the Commission's position would again be at odds with its practice of routinely approving license assignments. In the five-year period 1969-1973, for example, the Commission processed 165 voluntary television transfers.[43] In addition, the number of necessary divestitures is now further reduced, and the Commission did not really consider that in many instances companies can be expected to retain the television station and sell the newspapers.

Nor did the Commission explain in its decision how the alleged break in continuity would disserve

[42]Presumably, this is also what the Commission meant when it said that it would not order divestiture because of the "possibility of disruption for the industry." *Id.* at 1078, ¶ 109. (A. 198). Ironically, after five years of deferring to this rule-making, virtually all ad hoc challenges on concentration of control grounds—in order to consider the matter on an industry-wide scale (*see, e.g., Hale v. FCC, supra,* n. 14)—the Commission refused to require widespread divestiture partially on grounds of "disruption to the industry." However, the Commission elsewhere admitted that "trading of stations would tend to lessen concern based on financial losses or investment uncertainty." *Second Report,* 50 F.C.C.2d at 1080, n. 29. (A. 201). And the Commission failed to take into account the net gain, in terms of stability, resulting from the reduction of petitions to deny and competing applications based on a challenge to a licensee's "undue concentration of control." *See supra,* n. 32.

[43]*See* F.C.C. Annual Reports 1969-1973, pp. 130, 144, 148, 167, 201, respectively. In the six years prior to the *Second Report,* the Commission approved without hearing 678 license assignments, at least 40% of which were not *pro forma. NCCB,* 555 F.2d at 964, n. 99. (A. 423).

the public, as opposed to the private interests. As the Commission itself stated, "the Commission's function is not to protect stations from competition and the public interest is not disserved even at a station's demise, so long as another takes its place in providing public service programming." *Second Report,* 50 F.C.C.2d at 1075, n. 20 (A. 190). Similarly in *WLVA, Inc. v. FCC,* 459 F.2d 1286 (D.C. Cir. 1972), the Court held that where a licensee complains of insufficient funds in the market for a new entrant—a "Carroll" issue—the existing licensee must not only show that the insufficient revenues would lead to a net reduction of its public service programming, but also that this loss of public service programming "will not be offset by the increased non-network programming proposed to be offered by the applicant." *Id.* at 1297.

The Commission, however, cited no evidence to the effect that new licensees would be inferior to prior owners. *NCCB,* 555 F.2d at 964, n. 98 (A. 423). This latter point is reinforced by the Commission's statement that whatever superiority in performance their staff found in newspaper-owned television stations, it "was in no way shown to be a result of the fact of owning a newspaper. . . ." *Reconsideration,* 53 F.C.C.2d at 592 (A. 324).[44]

Indeed, the record shows that new owners are often more responsive to the local community. Usually a new entity in town tries harder to be accepted, see, *e.g.,* Testimony of James Alexander, Executive Director

[44]This Commission statement directly contradicts its own claim before this Court that "Divestiture introduced the danger of disrupting this proven, superior service—to the detriment of the public interest." FCC Br. at 24. It also disposes of Channel Two's similar claims in its Brief at 48.

of FACT, Inc., New Haven, Conn. (A. 941-42), whereas existing cross-owners do not have similar incentives. See, *e.g.*, Testimony of Nancy Schmidt, Chairperson, St. Louis Broadcast Coalition (A. 951-53). Thus the evidence in the record directly contradicted the Commission's speculations. Every representative of the listening or viewing public who presented evidence spoke in favor of divestiture; none spoke for retention of existing stations' programming service. In the only case where a newspaper licensee was replaced, moreover, the new licensee has performed excellently, and consistently rates at the top of all stations in the country in airing locally produced programming at prime-time.[45]

Channel Two and the Commission also argue that continuity is a positive good in itself, citing the Commission's anti-trafficking rules. (Channel Two Br. at 46-47; FCC Br. at 24). But as the Commission's citation to *Crowder v. FCC*, 399 F.2d 569 (D.C. Cir. 1968) demonstrates, trafficking offends the public interest mainly because it is the acquisition of a license with the intent to keep huge profits rather than to serve the public. *Id.* at 571. Loss of continuity of service is a footnote, which when applied to the cross-ownership rules becomes "makeweight."[46] *Second Report*, 50 F.C.C.2d at 1128 (A. 308) (Robinson, *dissenting*).

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[45]*See, e.g.*, E. Koch, "WCVB: Carrying the Torch," 29 *Access Magazine* 13 (1976) (showing high national rankings of the station that replaced WHDH-TV in Boston).

[46]Moreover, even in the context of trafficking the Commission presumes, in the normal course, that questions with regard to continuity will arise only if a license is transferred within the first three year license period. *See* 47 C.F.R. §1.597(a) (1976).

Furthermore, as the Court of Appeals pointed out, "A one-time alteration in the ownership structure of the broadcast industry should not affect the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity." *NCCB*, 555 F.2d at 964. (A. 422).

Finally, the Commission has in the past prevented transfers where the applicant proposes to diminish service to the public. *City of Camden*, 18 F.C.C.2d 412 (1969). It can do so again if the problem arises in the context of these divestitures.[47]

3. Economic Dislocation.

The Commission's third countervailing consideration was that "local economic dislocations" would in some way affect the public interest. (FCC Br. at 26-27). The Commission explains that the demand for equity capital might lead to a reduction of working capital available for programming, with a resultant possibility of diminution in public affairs programming.[48]

This rationalization, however, also lacks a reasonable or factual basis. The Court observed, for example,

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[47]The Commission's inaccurate claims (FCC Br. at 24-26) that it has not generally required divestiture upon adoption of new ownership rules is answered *supra*, n. 10.

[48]Channel Two notes references in the Commission's opinion for these statements (Channel Two Br. at 49, n. 79), as does the Commission (Br. at 27). However, their references to ¶¶ 57 and 77 of the Commission's decision are to the Commission's *summary* of broadcasters' allegations. The Commission conclusions, however, were totally speculative: "Local economic dislocations are also *possible* as a result of the vast demand for equity capital and widescale divestiture *could* increase interest rates and affect selling price too." *Second Report*, 50 F.C.C.2d at 1078, ¶ 108 (emphasis added). (A. 197). In fact, the Commission itself had elsewhere found that the pessimism towards reduced selling prices "may be exaggerated." *Id.* at 1072, ¶ 95 (A. 186).

that the same concern for availability of capital would be present in the case of voluntary transactions, which the Commission does permit. *NCCB*, 555 F.2d at 965 (A. 425).

Furthermore, the Commission has heretofore taken an approach to licensing directly contradictory to that it now claims overrides diversity. Thus, in *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 737-38 (D.C. Cir. 1976), the Court of Appeals affirmed the Commission's refusal to look at finances for programming as an element of the public interest. Unwilling to look at renewal time to the amounts or percentages of revenues a licensee reinvests into public service programming, the Commission cannot turn around and claim this same factor as overriding the diversity standard.

Similarly, the Commission cannot look to the long continuity of ownership by its newspaper cross-owners and then suggest that they would lose money by selling their licenses. These licensees have long ago recouped their investments, will receive indefinite deferral on capital gains taxes, 26 U.S.C. §1071 (1970), and if they still cannot recoup a fair price, the Commission will consider a waiver, 50 F.C.C.2d at 1085, ¶ 119, n. 46 (A. 211). Furthermore, while interest rates could conceivably be increased by numerous divestitures, prices would be reduced. The Commission made absolutely no factual evaluation of this question.

The petitioners admit that this criterion and the local ownership factor "are of relatively peripheral importance" (Channel Two Br. at 49) and "[not sufficient] in itself [to] outweigh the benefits possibly to be derived from divestiture" (FCC Br. at 27). As

we have demonstrated, they are also unsupported by reason, the record, or law.[49]

4. Unfairness to Existing Licensees.

The Commission expresses, in addition, a concern that it had earlier encouraged newspaper owners to enter the field, that these licensees have in many cases displayed good records of service, and that uprooting them would work "an inherent hardship, quite apart from any question of financial gain or loss." (FCC Br. at 27). The Commission refers to these factors as "legitimate renewal expectancies," which it now claims, "should not be destroyed without good cause." *Id.*[50]

a. *Divestiture Is Not Retroactive Rulemaking.*

However, this approach to divestiture misapplies the relevant law. A broadcaster has no vested right to its

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[49]Petitioners also appear to have abandoned any suggestion that divestiture would be detrimental to co-located newspapers. The argument was assessed by the Court at A. 425-26, and by Commissioner Robinson at A. 311-13. Both concluded that there is no record support for any such fears, and that if there were a "failing newspaper," waiver could be granted. Furthermore, if newspaper support were a Commission concern, there is no valid reason why a newspaper cannot be subsidized by profits from a broadcasting station in another city or through other investments made from the sale of the co-located facility.

[50]These factors are, of course, ones involving private interests rather than the public interest. For example, the Commission expresses concern for those newspaper owners who were allegedly encouraged to start broadcast stations in their communities by the Commission. But the fact of the matter is that these broadcasters have benefited from obtaining the most powerful frequencies in their cities which, if anything, warrant concern in the context of this proceeding because of their strength in preventing the entry of competitors. It should also be noted that the Commission's order extends this concern for the private interest to even those licensees who must divest within five years by shielding them from statutorily provided challenges. *See Second Report*, 50 F.C.C.2d at 1088-89, ¶ 130 (A. 218-19).

license beyond its three-year term.[51] Furthermore, the same public interest criterion applies to both initial and renewal applications. As this Court stated in *Ashbacker Radio Co. v. FCC*, 326 U.S. 327, 332 (1945), "licenses for broadcasting stations are limited to three years, the renewals being subject to the same considerations and practice which affect the granting of original applications."[52]

The courts have also held that an agency may adopt rules of general applicability without having to hold hearings on every application which such rules affect.[53] And broadcast renewal applications are subject to rules

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[51]47 U.S.C. §§301, 304, 307, 309(h) (1970) (A. 27-31); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

Section 304, not reprinted in the Appendix, provides:

> No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Section 309(h) provides in pertinent part:

> [E]ach license shall contain . . . a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right in the use of the frequencies designated in the license beyond the term thereof. . . .

[52]*See also FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) ("although investment in broadcasting stations may be large, a license may not be issued for more than three years"); *Fed. Radio Comm'n v. Nelson Bros.*, 289 U.S. 266, 282 (1933); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1207 (D.C. Cir. 1971) ("the Communications Act itself places the incumbent in the same position as an initial applicant.")

[53]*FPC v. Texaco*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co., supra*, n. 3; *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968); *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C.Cir. 1966) (en banc).

in effect not when the initial grant was made, but at the time of renewal.[54]

Thus, application of revised ownership rules to existing licensees at the time of renewal is not a "retroactive rule."[55] Had the Commission proceeded to revoke

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[54]*E.g., Transcontinent Television Corp. v. FCC*, 308 F.2d 339, 342 (D.C. Cir. 1962). *See also* the dissent in *American Airlines, Inc. v. CAB, supra*, n. 53, where even the dissenting judges agreed that the FCC, unlike the CAB, could act retroactively because "the Communications Act of 1934, . . . [unlike the Civil Aeronautics Act of 1938] gives the FCC broad powers to make frequencies available by rule amendment." 359 F.2d at 635, n. 3 (Burger, J., *dissenting*).

[55]The extensive documentation by some petitioners and *amici* of the ability of an agency not to apply a rule retroactively is thus inapposite. In any event, the Court of Appeals here reversed primarily on the Commission's arbitrariness in the manner it treated the issue, not that an agency must always apply its rules retroactively. *See* Counterstatement, *supra*, Section C.

Channel Two and the Commission have also misconstrued the case law. Both citing to, among other cases, *South Terminal Corp. v. EPA*, 504 F.2d 646, 674 (1st Cir. 1974), they claim that the courts have upheld "routine grandfathering" (Channel Two Br. at 40, n. 60), and that the EPA has refrained from applying "more stringent standards to existing facilities." (FCC Br. at 28).

In fact, however, the *South Terminal* Court held to the contrary. At the cited page the Court affirmed a new air quality plan for Boston, "[p]ending opportunity to review the proposed variance provision. . . ." *Id.* This is akin to a requirement for waiver provisions. Furthermore, the Court went on specifically to uphold the plan's application of reduced parking space requirements to a garage which was under construction on the date the plan was promulgated. In language directly analogous in the context of the licensing scheme for broadcasting, the Court of Appeals stated:

> We do not see any "retroactivity" here. The regulations do not penalize South Terminal for any conduct which, when engaged in, was permitted. At most they abrogate, for the future only, expectations South Terminal may have acquired in the past. But all changes in the law dash expectations when they make tomorrow's rules different from yesterday's. . . . *South Terminal, supra*, 504 F.2d at 678, *quoted with approval in K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES*, p. 166 (1976).

all licenses not in accordance with its new standards, the licensees would have a valid argument of retroactive application. But here, licensees required to divest would have an extensive five-year time period within which to comply with the rules.

Certainly when the Commission changed its rules and policies to require licensees to abide by new hours for presunrise operation, for example, no licensee had any ground to complain of retroactivity or of denial of their rights to a hearing. ***WBEN, Inc. v. FCC,*** ***supra,*** n. 53. The only difference is that the rules here in issue look towards ownership of the license itself, as opposed to modifications of the rules for the times certain stations may broadcast.

b. *Divestiture Is Not Severe or Harsh.*

Congress has long recognized, however, that changes in FCC ownership rules may require divestiture. Indeed, in 1944 Congress amended the Internal Revenue Code to foster such divestitures by means of tax certificates. These certificates allow for deferred payment of capital gains taxes on properties sold or exchanged to effectuate a change in FCC ownership rules. 26 U.S.C. §1071 (Appendix herein). Thus, divestiture is at worst a special case which Congress has specifically approved of and provided for in the context of FCC ownership rule changes. This legislation, furthermore, diminishes any view of the remedy as "severe" or "harsh."

In fact, divestiture does not impose a forfeiture of any kind on licensees. While a licensee is prohibited by law from holding a property interest in its license, many licenses are sold for great sums beyond the tangible property value, basically on the value of having a government enforced monopoly over a given fre-

quency in an assigned city.[56] Moreover, waivers are allowed if licensees cannot obtain "fair value" for their facilities.[57]

In the past the Commission has not taken the view that divestiture is "harsh" when it was required in order to effectuate a change in ownership policies. Indeed, while there are some exceptions, the Commission has usually adopted a divestiture requirement in such circumstances.[58] Most often when the Commission has grandfathered, it has served the purpose of continuing a certain level of service or of diversity.[59] Finally, the divestiture remedy is commonly employed for concentrations of control in antitrust cases. *United States v. E. I. DuPont de Nemours & Co.,* 366 U.S. 316, 326-35 and nn. 11-13 (1961).

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[56]*See, e.g., "WMAL-TV Fetches $100 Million, Trading Record," Broadcasting Magazine, supra,* n. 39, describing sale of one television station for approximately $100,000,000. Under recent FCC orders, licensees currently pay no fees to the government for use of the frequency. *Public Notice,* FCC-1197, December 23, 1976.

[57]*Second Report,* 50 F.C.C.2d at 1085, ¶ 119 and n. 46 (A. 211).

[58]*See* list of Commission ordered divestitures, *supra* at n. 10. This disproves the Commission's argument at p. 28 of its Brief that it has usually and routinely grandfathered licensees in adopting multiple ownership rules.

[59]Thus, the Commission's list of instances where it has grandfathered (FCC Br. at 28) includes allowing CATV to continue importation of distant signals, *CATV Rules,* 2 F.C.C. 2d 725, 785 (1966) and 36 F.C.C.2d 143 (1972), and allowing radio stations to continue to serve certain areas. However, the grandfathering there was to allow the audience to keep the diversity of signals they already had. *E.g., CATV Rules, supra.*

Requiring divestiture, on the other hand, would simply replace one owner with another, the latter presumably to provide the community with a greater diversity of expression. The Commission, furthermore, has specifically found that any small superiority in past broadcast service by newspaper owners "was

(This footnote is continued on next page)

5. Best Practicable Service.

Furthermore, the Commission's concern with "best practicable service," (FCC Br. at 5, 23-24) is misplaced insofar as it fails to consider diversity. Diversity, the Commission has recently pointed out, is one element of the general goal of "best practicable service" even in renewal proceedings.[60] Moreover, when the Commission has in the past weighed diversity against the best practicable service in a non-renewal situation, diversity has prevailed. *Terre Haute Broadcasting Corp.*, 25 F.C.C.2d 348 (1970). For instance, in *McClatchy Broadcasting Co. v. FCC, supra,* n. 21, the Commission preferred the applicant serving the diversification goal

in no way shown to be a result of the fact of owning a newspaper, but rather could just as well be explained in terms of journalistic tradition and pioneering broadcast operations." *Reconsideration, supra,* 53 F.C.C.2d at 592 (A. 324).

[60]As the Commission stated, in discussing an earlier *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants,* 22 F.C.C.2d 424, *recon. denied,* 24 F.C.C.2d 383 (1970), *rev'd sub nom. Citizens Communications Center, supra,* n. 4:

> Under this policy, consideration of the characteristics normally explored in a comparative hearing involving new applicants, i.e., *diversification of the media . . . as well as other elements of the "best practicable service" objective* [citing the *1965 Policy Statement, supra*] would not be necessary [where a licensee's past operation was solid].

Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 40 P. & F. Radio Reg. 2d 763, 765 ¶ 4 (1977), *appeal pending sub nom. National Black Media Coalition v. FCC,* D.C. Cir. No. 77-1500.

NCCB cites this as the most recent Commission statement on this issue, although it would appear that this characterization is not completely consistent with past cases. Nevertheless, it is logical that if diversity is a primary goal, it would in fact be one element in any determination of the best practicable service. It is certainly preferable, as a content neutral measurement, to any governmental attempts to delve into the content of particular programs, although the latter may be necessary in extreme cases. *E.g., Office of Communication of the United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966).

over a competing applicant who was superior in all other comparative criteria.

These decisions are consistent, moreover, with the *1965 Policy Statement, supra,* where the Commission considered diversification the single most significant factor in selecting a licensee, while "past broadcast record" is only sixth in importance. Surely here, in the context of a rulemaking, diversification should take precedence over local economic dislocations, local ownership (without regard to whether the owners are integrated into management), "continuity of service" and the private interests of certain licensees.

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In sum, then, the Court of Appeals correctly found that the evidence did not support the Commission's grounds, that the grounds were unreasonable, and that the Commission failed to apply its own statutory and administrative presumption in favor of diversity to the hard facts before it.

III.

THE COMMISSION'S STANDARDS FOR DIVESTITURE AND FOR AD HOC CHALLENGE ARE IRRATIONAL.

The Court of Appeals, in summarizing its decision, stated the effect of the Commission's rule as follows:

> [T]he lines thus drawn between future and present co-located combinations and between the 16 egregious cases [that must divest] and all other present co-located combinations were arbitrary and capricious.

NCCB Order on Motion for Stay of Mandate, 555 F.2d at 968-69 (A. 440).

The Court thus found the two lines, drawn among the three groups, irrational. The first line—that of

distinguishing between future and existing licensees—has been addressed in the previous section. The Commission did not have a rational basis for preferring certain lesser policy criteria over the Commission's strong interest in diversification.

The second line—that of differentiating among existing licensees—is perhaps more complex because it involves two separate criteria. The first is that criterion for placing existing licensees in the divestiture category, or, to, in effect, treat existing cross-ownerships like future ones. As we explain below, the Commission used an "effective monopoly" standard here.

The second aspect of this line is the standard for considering whether any remaining licensee not required to divest under the "effective monopoly" standard ("the egregious 16") should also be placed in the divestiture category. This is the so-called ad hoc standard, and it too was arbitrary and capricious.

Generally both the divestiture standard and the ad hoc standard suffer from the irrationality of the Commission's failure to relate the standards to the underlying purposes of the rule in issue.

A. The Standard for Divestiture.

The Commission imposed divestiture in 16 "egregious" cases of what the Commission described as "effective monopolies." *Second Report*, 50 F.C.C.2d at 1081 (A. 203). Yet its standard for selecting such effective monopolies did not use Sherman Act or other monopoly definitions but rather a diversity-based standard. Licensees were exempt unless there were no other incoming signals in that broadcasting service of city-grade strength.

The Commission's "one incoming signal" standard, which, if met, places a concentrated licensee in the more favored class,[61] immediately exempts cross-owners in every medium-sized and large market in the country. Yet, under various criteria measuring concentration of control, certain licensees required to divest are not as concentrated as some who are grandfathered. *Compare, e.g.*, Albany, Georgia with Elkhart, Indiana in RAND's "Concentration Indices." (A. 979). And, if diversity is truly the Commission's goal, it has not accounted for its finding from the record in *Chronicle Broadcasting Co.*, 40 F.C.C.2d 775, 782 (1973) that 10% of the population of the San Francisco metropolitan market, or over 400,000 people, receive their news exclusively from the now grandfathered *Chronicle* outlets.

The approach is quite clearly irrational. Reason would dictate that in setting a per se standard for divestiture by "effective monopolies," the Commission might resort to a Sherman Act or other antitrust-type standard.[62] Further, in setting a standard for

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[61]The Commission has recently ruled that all grandfathered licensees will have the benefits of tax deferral when they do divest, even 20 years from now, by declaring that its tax certificate policy will no longer require a causal connection (such as a three-year time period) between the adoption of the Commission's new ownership policy and the sale or exchange "appropriate" to effectuate such a rule change. *Tax Certification Policy*, 59 F.C.C.2d 91 (1976), *petition for reconsideration pending*.

[62]Under the Sherman Act, 75% concentration has been held to be prima facie monopoly, *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The Commission, however, has grandfathered many licensees who control such an extensive share of the market. The Commission sought to restrict "monopolies," but did not take into account what constituted a monopoly under the antitrust laws. Ironically, it did apply a strict antitrust standard where it should have used a diversity-based standard.

ad hoc challenge, the Commission would rationally continue to take a diversity-based approach towards concentration, allowing parties to plead facts which meet the underlying bases for the rules.[63] Regardless of what the numbers may be,[64] a reasonable rule short of across-the-board divestiture would have to be similarly designed.

B. The Ad Hoc Standard.

In describing the Commission's action with respect to existing licensees, the parties speak generally in terms of grandfathering those interests. The Commission, however, did not simply grandfather. Rather, it entrenched those licensees into their concentrated positions by adopting a stricter, near impossible standard for ad hoc challenges to those licenses based on undue concentration of control grounds. *NCCB*, 555 F.2d at 968-69 (A. 440) ("challenges to renewal of . . . [grandfathered] stations' licenses would have to meet tougher threshold requirements.")

In a brief passage in the *Second Report*, the Commission held that

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[63]The multiple ownership rules, at one point, provide that a license shall be granted if it would result in a concentration of control of broadcasting contrary to the public interest. Although the rule goes to the national limit of stations, the Commission's "considerations . . . to the facts of each case" are instructive here. They include "the size, extent and location of areas served, the number of people served, classes of stations involved, and the extent of other competitive service to the areas in question." 47 C.F.R. §§73.35(b), 73.240(a)(2), 73.636(a)(2)(1976) (A. 243-44, 250-51, 257-58).

[64]NCCB suggested that 30% concentration warrant per se divestiture, and 20%-30% prima facie concentration. (A. 840). Commissioner Robinson adopted a similar standard (A. 278), and the Court of Appeals contemplated that this kind of approach was possible on remand. (A. 393, n. 53).

> [A]bsent a showing of economic monopolization that might warrant actions under the Sherman Act, it would not be our view that [petitions to deny renewals based on questions of undue concentrations of control] . . . would raise valid issues necessitating the designation of renewal applications for hearing.

Id., 50 F.C.C.2d at 1088, ¶ 130 (A. 218). The Commission gave no indication of its reasoning for adopting this standard, and the Court of Appeals found that the Commission "without reasoned discussion," had "abandoned its former policy of allowing petitioners to deny the opportunity to demonstrate in any one of several ways that cross-ownership harms the public interest." *NCCB*, 555 F.2d at 966, n. 108 (A. 428).[65] The Court pointed out that "[t]he Commission's decision to substitute an antitrust standard for this open-ended test is inconsistent with the Order's emphasis on First Amendment considerations," and that this "unreasonably curtails the interests of petitioners to deny." *Id.*

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[65]The Commission's previous policy was to consider charges of undue concentration of control in various manners. *See* 47 C.F.R. §§73.35(b), 73.240(a)(2), 73.636(a)(2)(1970). In the renewal context the Commission had designated separate hearing issues on undue structural concentration, absent abuses or monopolization in, for example, *Frontier Broadcasting Co., supra*, n. 13 (Cheyenne, Wyoming); *Midwest Radio-Television, Inc.*, 16 F.C.C.2d 943, 18 F.C.C.2d 1011 (1969), *later deferred to Docket 18110*, 24 F.C.C.2d 625, 626-28 (1970) (Minneapolis-St. Paul); *Chronicle Broadcasting Co.*, 16 F.C.C.2d 882 (1969) (San Francisco) *later deferred to Docket 18110*, 40 F.C.C.2d 775, 796 (1973). In other contexts the Commission also found undue structural concentration to raise public interest questions. *E.g.*, Transfers: *Jonquil Broadcasting Co.*, 21 F.C.C. 2d 178 (1970); *Gale Broadcasting Co.*, 15 P.&F. Radio Reg. 2d 337 (1969); *Miami Broadcasting Co.*, 1 P.&F. Radio Reg. 2d 43 (1963); Initial applications: *Lee Enterprises, Inc.*, 18 F.C.C.2d 684 (1969); *American Television Co.*, 12 F.C.C.2d 518 (1968).

(A. 429). The Court noted, in passing on the reasonableness of the Commission's action, that the Commission had based its grandfather rule on the fact that the record did not contain evidence documenting the harmful nature of cross-ownership. If the grandfather policy had been supportable at all, the Court observed, the Commission should have encouraged "showings of harm in individual markets rather than effectively to prohibit it." *Id.* (A. 428-29).

Moreover, the Court found that the right granted by the Commission was as a practical matter a right foreclosed. In the first case where such issues were presented, the Commission backed away from its new standards, claiming it had neither the "expertise" nor "experience" to enforce antitrust laws and, moreover, that it believed to do so would be "inappropriate." *WGAL-Television, Inc., supra,* n. 17, 62 F.C.C.2d at 531 (1976). Quite clearly, the Commission, in adopting its "grandfather rule" has made it impossible for "safety valve" procedures to be employed in determining whether the purposes of the rule would better be served by its non-application. See *United States v. Storer Broadcasting Corp., supra.*[66]

Additionally, the Commission's ad hoc Sherman Act standard does not fully relate to the underlying purposes

[66]As Judge Leventhal observed in *WAIT Radio v. FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969):

> The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure. . . . That an agency may discharge its responsibilities by promulgating rules of general application . . . does not relieve it of its obligation to seek out the "public interest" in particular individualized cases.

of the rules. It neither takes the goal of diversity into account,[67] nor does it sufficiently allow for full exploration of the competitive aspect of the rule, short of "economic monopolization."[68] Thus, the Commission does not consider extreme concentration, short of an intent to monopolize,[69] and it appears from subsequent cases to be unable even to apply its own standard.

The seriousness of the Commission's lack of reasonable standards is best demonstrated by the facts presented in the *WGAL* case, where the Commission refused to examine the competitive issues, *WGAL-Television, Inc.,* 62 F.C.C.2d 527 (1976). In that case, petitioners alleged that one family had owned a monopoly in Lancaster, Pennsylvania, of the daily and Sunday newspapers, the only VHF station in the region, two radio stations, and the city's only cable system. They estimated that this family controlled 89% of local advertising revenues and, among other things, that the daily newspaper carried only television listings of its own station. The licensee had been grandfathered be-

[67]Thus, in *McPherson Broadcasting, Inc.,* 54 F.C.C.2d 565, 566 (1975), where the licensee was the owner of the only newspaper and only radio stations assigned to McPherson, Kansas, but the city received signals from neighboring Salina, the Commission refused to consider evidence of 22.4% verbatim overlap of local news stories between the commonly owned newspaper and radio station, stating, "Here petitioners have failed to allege specific facts which might warrant action under the antitrust laws of the United States." *Id.*

[68]*See, e.g., Newhouse Broadcasting Corp., supra,* n. 32.

[69]The Commission has stated that if a grandfathered licensee later meets the standard for divestiture—that is, where the only competing signal has been withdrawn from the market for some reason—it will not later require divestiture. *Reconsideration, supra,* 53 F.C.C.2d at 590-91 (A. 320).

cause a UHF station, assigned to Lebanon-Lancaster, technically placed a city-grade signal over the city, although petitioners submitted affidavits from local residents that they could not receive an adequate signal without subscribing to the licensee's cable system, and over 15,000 residents did not have UHF receivers.

Although the Commission did designate WGAL's application for hearing, it narrowly limited the issue to a determination of facts and circumstances surrounding three specific abuses, *id.*, 62 F.C.C.2d at 535, declining to look into "economic monopolization," *id.*, 62 F.C.C.2d at 532, n. 11. The Commission stated:

> The Commission has neither the expertise nor the statutory authority to enforce the antitrust laws in its regulation of the broadcast industry. In our view, enforcement of the Sherman Act and similar statutes rests properly with other federal agencies entrusted with the expertise and jurisdiction over these matters. *Id.*, 62 F.C.C.2d at 531.

The Commission also ignored the petitioners' request for special relief from the grandfather rule, looking towards divestiture as a remedy instead of looking only to license forfeitures.[70]

The Commission's emphasis on economics in the ad hoc standard is all the more puzzling in view of its sole reliance on the diversity standard for deter-

[70]In *Frontier Broadcasting, supra,* n. 13, the Commission contemplated in a renewal proceeding that an undue concentration of control finding might warrant the remedy of divestiture. However, the Commission's ad hoc standard adopted in Docket 18110 does not contemplate divestitures as a remedy. *Cf. Effingham Broadcasting Co.,* 51 F.C.C.2d 453, 457 (1975) (ad hoc standard, if met, would have merited renewal hearing for licensee already required to divest).

mining which licensees would be required to divest. There, the Commission rejected an antitrust approach, stating that its concern was "diversity in ownership as a means of enhancing diversity in programming service to the public." *Second Report,* 50 F.C.C.2d at 1079, ¶ 110 (A. 199).

IV.

A REVIEWING COURT MAY INSTRUCT AN AGENCY ON REMAND WHERE FAIRNESS AND THE PUBLIC INTEREST SO DICTATE.

This Court has previously struck down arbitrary grandfather clauses.[71] *A fortiori* it should affirm

[71]Grandfathering began as attempts by some States to disenfranchise black voters by imposing a strict literacy requirement to vote, exempting all those whose relatives voted prior to 1866. They were found contrary to the Fifteenth Amendment. *Guinn v. United States,* 238 U.S. 347 (1914). Claiming a state interest in having a well-informed electorate, Oklahoma had exempted most of the population from its literacy test in order to favor white voters.

Similarly, claiming the need to promote the public's First Amendment interest in diverse information sources, and to protect the public from concentrations of control over the media, the Commission has arbitrarily exempted many of the nation's large population centers from the benefits of that policy, instead designing a rule to favor the established interests.

Nor may the Commission be presumed in good faith here. As the Court of Appeals once warned, "Our experience with the problem of grandfathering in the communications industry has been such that I am unwilling to accept blithely the Commission's assurances of good intentions." *Pikes Peak Broadcasting v. FCC,* 422 F.2d 671, 685 (D.C. Cir. 1969) (Bazelon, C.J., *concurring*).

The Court in *United States v. Maher,* 307 U.S. 148 (1939), cited by petitioners (FCC Br. at 29; NAB Br. at 44, 46; Channel Two Br. at 42) simply reviewed whether the Interstate Commerce Commission properly found that the petitioner did not fall within the grandfather clause of the Motor Carrier Act. It did not prohibit a court from overturning an irrational grandfather clause.

(This footnote is continued on next page)

the lower court's reversal of an arbitrary system which not only grandfathers, but irrationally shields concentrated licensees from equitable enforcement of the public interest standard of the Communications Act.

The petitioners argue that the Commission, like other agencies, should be allowed discretion to determine whether or not to apply a new rule to existing licensees. But this begs the question. The Commission decided to require some licensees to divest; the Commission's authority to impose divestiture requirements is by now beyond question;[72] and the issue then becomes simply whether the grandfather exception which swallowed the rule is arbitrary and capricious.

Even if divestiture were regarded as retroactive, despite the three-year license limitation contained in the Communications Act,[73] the NAB can hardly complain of a Court of Appeals reversal of the FCC's failure to apply a rule or decision retroactively. In *National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118 (D.C. Cir. 1976), the Court required the Commission to apply *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), retroactively, and refund excess fees collected under an improper fee schedule.

New Orleans v. Dukes, 427 U.S. 297 (1974), affirming a grandfather clause over a Fourteenth Amendment equal protection challenge, looked to whether the remedy in question was reasonably related to the goal of the ordinance. Here the Court of Appeals correctly found that the Commission had no record support or rational basis for the distinctions in its remedies. As we have shown, the grandfathering is not reasonably related to the goals of the rule.

[72] *General Telephone Co. of the Southwest v. FCC, supra*, n. 4; *Metropolitan Television Corp. v. FCC, supra*, n. 10.

[73] 47 U.S.C. §§301, 304, 307, 309(h) (1970). The First Circuit has held that application of new environmental standards to a parking lot already under construction is not retroactive rulemaking. *South Terminal Corp. v. EPA, supra*, n. 55.

As Judge McKinnon wrote in *NAB*, "The general rule of long-standing is that judicial precedents normally have retroactive as well as prospective effect." *Id.*, 554 F.2d at 1130. The *NAB* Court later expands, quoting from *B. J. MOORE, FEDERAL PRACTICE* at 0.402 [3.-2-2] (1974), that "consistency in the administration of justice is a desirable goal, to be pursued in the absence of compelling circumstances justifying another result." *Id.* at 1131. The *NAB* Court went on to apply this reasoning to the FCC's fee schedule rules. In analyzing the normal bases for applying a decision prospectively only, the Court considered the factors of "(1) the extent of justifiable reliance upon the rejected precedent or rule; (2) the purpose of the newly announced rule; (3) the degree of finality . . . and (4) the element of surprise." *Id.*, 554 F.2d at 1132.

Here, the purpose of the newly announced rule is to promote diversity throughout the country. It should apply to those concentrations of control in existence now as well as those in the future. Further, newspaper owners cannot now claim surprise at the implementation by rule of a policy which has been applied on an ad hoc basis for decades, nor can they claim that "justifiable reliance" or "degree of finality" is properly weighed on the side of entities which are entitled to no more than a three-year license. Simply, the *NAB* case is analogous to the instant one, and supports the Court's decision below.

Similarly, this Court in *Addison v. Holly Hill Co.*, 322 U.S. 607 (1944) ordered an administrator of the Fair Labor Standards Act to prepare a new regulation to be applied retroactively. Justice Frankfurter stated, for the Court,

> [A]gainst retroactivity we balanced the considerations that made retroactivity the lesser evil.
>
> In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them. The interplay between law and equity . . . has properly been drawn upon in working out accommodating relationships between the judiciary and administrative agencies. And certainly in specific cases . . . it is consonant with judicial administration and fairness not to be balked by the undesirability of retroactive action. . . .

Id., 322 U.S. at 622. See also *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (upholding retroactive agency rule). *Cf. Williams v. Washington Metropolitan Area Transit Commission*, 415 F.2d 922, 943 (D.C. Cir. 1968) (en banc), *cert. denied*, 393 U.S. 1081 (1969) (Court ordered refund of transit fares collected under invalid fare structure).

There are other examples of strong judicial orders where the agency loses sight of its purpose. In *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969), for example, the Court of Appeals found a renewal hearing beyond repair and itself lifted the license, allowing the renewal applicant to reapply on an equal footing with competitors. The point in that case, *NAB*, *Addison*, and *Chenery* is that the public interest prevails. And here the Commission simply lost sight of the public when looking at the powerful licensees it must regulate.[74]

[74]As Judge Friendly has characterized the propriety of orders such as the one here under review, "There are those cases where, although the Court speaks of inadequate findings, the real trouble is that the agency has misconstrued the statute. Here there must be reversal and usually a direction rather than a discretionary remand." H. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 *DUKE L.J.* 199, 223 (1969).

While the Court of Appeals had the authority to require the Commission to adopt an equitable rule, the Court did not go so far as the petitioners, in their zeal for reversal, indicate. The Court of Appeals simply ordered the agency to act rationally and consistently with its authorizing statute, and its own policies. It therefore did not, as petitioners argue (*e.g.*, FCC Br. at 37; Dispatch Printing Co. Br. at 19), usurp the role of weighing competing factors. Instead, it required the Commission to act reasonably in applying its own standards, and to explain its departure from prior norms in the relative weights accorded diversity and the other lesser factors the Commission considered. *See Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954).

Finally, the Court of Appeals left the Commission with discretion as to the particular form any rule on remand would take.[75]

CONCLUSION.

The paramount principles involved in this case, NCCB suggests, were summed up almost ten years ago when the Court of Appeals stated in *Joseph v. FCC*, 404 F.2d 207, 211-12 (D.C. Cir. 1968):

> The public welfare requires the Commission to provide the "widest possible dissemination of infor-

[75]This is evidenced by the Court's recognition at n. 53 (A. 393) that the Commission might "adopt on remand a policy of requiring divestiture where combinations have over 30% of the market. . . ." This is hardly a statement which could be made by a court ordering divestiture of *all* co-located combinations.

mation from diverse and antagonistic sources" and to guard against undue concentration of control of communications power.

* * *

[A]n agency may change its standards prospectively, though that power is not in derogation of the duty to change them retrospectively when that better furthers the overall public interest.

For the foregoing reasons, Respondent NCCB respectfully requests this Court to reinstate the decision of the Court of Appeals and to affirm its judgment.

Respectfully submitted,

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December 20, 1977

Counsel wish to acknowledge the research work of UCLA law students Ms. Fern Kaplan and Ms. Linda J. Lacey.

APPENDIX.

26 U.S.C. § 1071(a) (1970):

§ 1071. Gain from sale or exchange to effectuate policies of F.C.C.

(a) *Nonrecognition of gain or loss.*—If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of section 1033. For purposes of such section as made applicable by the provisions of this section, stock of a corporation operating a radio broadcasting station, whether or not representing control of such corporation, shall be treated as property similar or related in service or use to the property so converted. The part of the gain, if any, on such sale or exchange to which section 1033 is not applied shall nevertheless not be recognized, if the taxpayer so elects, to the extent that it is applied to reduce the basis for determining gain or loss on sale or exchange of property, of a character subject to the allowance for depreciation under section 167, remaining in the hands of the taxpayer immediately after the sale or exchange, or acquired in the same taxable year. The manner and amount of such reduction shall be determined under regulations prescribed by the Secretary or his delegate. Any election made by the taxpayer under this section shall be made by a statement to that effect in his return for the taxable year in which the sale or exchange takes place, and such election shall be binding for the taxable year and all subsequent taxable years.

Supreme Court, U. S.
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Nos. 76-1471, 76-1521, 76-1535,
76-1536, 76-1624, 76-1635

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF JOINT RESPONDENTS

[illegible] Systems, Inc., The Brockway [illegible] Printing Company, [illegible] Owosso Broadcasting Company, Inc.

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
IDENTITY OF RESPONDENTS	1
STATEMENT OF THE CASE	3
ARGUMENT	7
I. The Court of Appeals' Invalidation of the FCC's Limited Divestiture Order Was a Lawful Exercise of Its Reviewing Authority and Involved No Improper Substitution of Judicial for Agency Judgment	7
II. The Commission's Limited Divestiture Order Has No Support in the Record	9
III. The Commission's Limited Divestiture Requirement Was Arbitrarily Imposed without Consideration of the Very Factors Which Compelled the Agency to Grandfather Most Existing Newspaper-Broadcast Combinations	11
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Buckeye Cablevision v. *FCC*, 387 F.2d 220 (D.C. Cir. 1967) 7
Capitol Airways, Inc. v. *CAB*, 292 F.2d 755 (D.C. Cir. 1961) 12
Carroll Broadcasting Co. v. *FCC*, 258 F.2d 440 (D.C. Cir. 1958) 14
Citizens Communications Center v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971) 16
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 19
City of Chicago v. *FPC*, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972) 11
Columbia Broadcasting System, Inc. v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971) 12
FCC v. *WOKO, Inc.*, 329 U.S. 223 (1946) 8
Fidelity Television, Inc. v. *FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975) 16
Garrett Broadcasting Service v. *FCC*, 513 F.2d 1056 (D.C. Cir. 1975) 12
Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) 14, 16, 18
Home Box Office, Inc. v. *FCC*, —— F.2d —— (D.C. Cir. No. 75-1280, *decided* March 25, 1977), *cert. denied*, 46 U.S.L.W. 3190 (October 3, 1977) 10, 11
Kuczo v. *Western Connecticut Broadcasting Co.*, —— F.2d —— (2d Cir. No. 77-7111, *decided* October 27, 1977) 10
Melody Music, Inc. v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965) 12, 18, 19
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 8
Pinellas Broadcasting Co. v. *FCC*, 230 F.2d 204 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956) 16
Radio Station KFH Co. v. *FCC*, 247 F.2d 570 (D.C. Cir. 1957) 18
Secretary of Agriculture v. *United States*, 347 U.S. 645 (1954) 18

TABLE OF AUTHORITIES—Continued

Page

Sunbeam Television Corp. v. *FCC*, 243 F.2d 26 (D.C. Cir. 1957) 12
United States v. *Maher*, 307 U.S. 148 (1939) 7
United States v. *Radio Corp. of America*, 358 U.S. 334 (1959) 9

FCC Authorities:

Farragut Television Corp., 5 F.C.C.2d 93 (1966) 16
First Report and Order (Dkt. 18110), 22 F.C.C.2d 306 (1970), *as modified*, 28 F.C.C.2d 662 (1971) 3, 4
Further Notice of Proposed Rule Making, 22 F.C.C.2d 339 (1970) 4
Historyland Radio, 28 F.C.C. 69 (1960) 16
Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 15
Second Report and Order (Dkt. 18110), 50 F.C.C. 2d 1046, *recon. denied*, 53 F.C.C.2d 589 (1975) 4, 5, 6, 9, 13, 14, 15, 16, 17, 19

Statutes:

Administrative Procedure Act, Section 4, 5 U.S.C. § 553 10
Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* 14, 16

In the Supreme Court of the United States

OCTOBER TERM, 1977

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---

BRIEF OF JOINT RESPONDENTS

QUESTIONS PRESENTED

Joint Respondents adopt the four Questions Presented on page 3 of the November 17, 1977 Brief of National Association of Broadcasters, Petitioner in No. 76-1595, but submit a fifth Question Presented, as follows:

Whether the Court of Appeals properly held that the Commission's divestiture rule, limited to 16 small-market newspaper-broadcast combinations, was arbitrary, capricious and without record support.

IDENTITY OF RESPONDENTS

Owosso Broadcasting Company, Inc., the licensee of Radio Stations WOAP(AM) and WOAP-FM, Owosso, Michigan, is owned by the Owosso Argus Press Company, which publishes *The Argus-Press*, a daily newspaper in Owosso. Owosso is in central Michigan about

85 miles northwest of Detroit. Its 1970 population is 17,179. *The Argus-Press* was established in 1854. WOAP began operation in 1947, some 30 years ago, and WOAP-FM began operation in 1965.

WJAG, Incorporated is the licensee of Radio Stations WJAG(AM) and WJAG-FM, Norfolk, Nebraska. WJAG, Incorporated is wholly owned by Huse Publishing Company, the publisher of *The Norfolk Daily News*. Norfolk is in northeastern Nebraska and has about 16,000 persons. Huse placed WJAG(AM) on the air 55 years ago, in 1922, as the second radio station in Nebraska. Since WJAG is restricted to daytime-only operation, WJAG sought to provide Norfolk a full-time aural service by requesting a Norfolk FM allocation. WJAG-FM was placed on the air in 1971. Huse has published *The Norfolk Daily News* since 1887.

Daily Telegraph Printing Company ("Daily Telegraph") is the licensee of Stations WHIS(AM), WHAJ (FM) and WHIS-TV, Bluefield, West Virginia, a community of about 16,000. It also publishes *The Bluefield Daily Telegraph*, a daily newspaper. Daily Telegraph has continuously operated WHIS since it was built in 1929. WHAJ was activated in the late 1940's and, after a silent period in the 1950's, has operated since 1963. Daily Telegraph petitioned the Commission to assign Channel 6 to Bluefield as a first area commercial VHF allocation; and it activated WHIS-TV in 1965. It has published *The Bluefield Daily Telegraph* since 1896. Bluefield is the 139th television market according to the American Research Bureau rankings.

The Brockway Company is the licensee of Radio Station WWNY, Watertown, New York, an upstate community of about 30,000, and of WWNY-TV, Channel 7, in nearby Carthage, New York, a community of about 4,000. It publishes *The Watertown Daily Times*, a Watertown daily newspaper. Brockway has operated Station WWNY for over 36 years, having bought it in 1941.

It urged the Commission to assign Channel 7 to Carthage as the first VHF allocation in the Watertown-Carthage area; and it activated WWNY-TV in 1954. *The Watertown Daily Times* has been published for 116 years, of which the past 44 years have been under its present ownership. Watertown is the 163rd ARB television market.

Gray Communications Systems, Inc. owns WALB, Inc., and has for over 23 years been the licensee of Station WALB-TV, Channel 10, Albany, Georgia, a community of about 73,000 persons in southwestern Georgia. It has owned Albany Herald Publishing Co., which publishes *The Albany Herald*, a daily newspaper in Albany, since before 1954 when it activated WALB-TV. Albany is the 138th ARB television market.

STATEMENT OF THE CASE

Until these proceedings, the Commission permitted common ownership of co-located stations in each broadcast service. One could thus own in combination one AM, one FM and one television station in the same community. While there was no prohibition of common ownership in a geographic area, the Commission did examine concentration of ownership on an *ad hoc* basis. Respondents' licenses were all granted and repeatedly renewed during this period.

On March 25, 1970, the Commission's *First Report and Order* in Docket 18110 (22 F.C.C.2d 306, JA 33) adopted rules prohibiting prospective common ownership of co-located VHF television stations and radio stations. These rules did not require divestiture, but provided that upon a sale of co-located, commonly owned VHF television and radio stations, they must be sold to separate parties. These rules did not prohibit common ownership of co-located newspapers and broadcast stations.

Upon issuance of its *First Report and Order*, the Commission released a *Further Notice of Proposed Rule Making* in Docket 18110 (22 F.C.C.2d 339, JA 101) which proposed divestiture, within five years, to reduce one party's holdings in a market to one or more daily newspapers, or one television station, or one AM-FM radio combination. Under the proposal, no grants of new or additional broadcast licenses would be made to owners of co-located daily newspapers. This divestiture proposal drastically departed from the past practice of limiting such rules to prospective effect, and existing local newspaper-broadcast interests strongly opposed the divestiture concept.

By the fall of 1971, all comments on this *Further Notice* were received. No action was taken until February 28, 1974, when a *Memorandum Opinion and Order* was adopted giving interested parties the opportunity to file updated comments on the *Further Notice* and scheduling oral argument, which was held July 24-26, 1974 (JA 127).

On January 28, 1975, the Commission issued its *Second Report and Order* terminating the proceeding in Docket 18110 (50 F.C.C.2d 1046, JA 134). This continued without change the rules governing existing co-located television-radio combinations or AM-FM radio combinations. However, new restrictions on co-located radio-newspaper or television-newspaper combinations were adopted. Divesture was required by January 1, 1980, where the only daily newspaper of general circulation in the community is commonly owned with the only radio station(s) placing a city grade signal over the community during daytime hours. Such divestiture can be effected by the sale of the newspaper or the radio station(s). Where other newspapers or broadcast stations serve the community, co-located newspaper-radio combinations are not required to divest, but if such combinations are sold they must be sold to separate parties. The formation

of new co-located radio-newspaper combinations is forbidden.

These new rules likewise require divestiture by January 1, 1980, where the only daily newspaper of general circulation in the community and the only commercial television station placing a city grade signal over the community are commonly owned, regardless of the number of independently owned radio stations serving the area. This divestiture can be effected by sale of the newspaper or the television station. New co-located television-newspaper combinations are prohibited. These are held to be "co-located" if the Grade A contour of the television station encompasses the community of the newspaper. All other co-located newspaper-television combinations need not divest, but if such combinations are sold, they must be sold to different parties. Waivers of any required radio-newspaper or television-newspaper divestiture would be considered only upon a showing of (1) inability to sell the station; (2) inability to support separate ownership and operation of the newspaper and station; or (3) other reasons why the purposes of the new rules would be disserved by divestiture (Appendix G of *Second Report and Order*, JA 264-66).

Appendix D of the *Second Report and Order* lists seven communities, including Albany, Georgia; Bluefield, West Virginia; and Watertown, New York, as "TV Station Monopolies—Divestiture Required" (JA 242). Appendix E lists nine communities, including Owosso, Michigan, and Norfolk, Nebraska as "AM and FM Station Monopolies—Divestiture Required" (JA 242). Thus, all five respondents are required to divest themselves before 1980 of either their newspapers or their co-located radio or television stations. Of the 16 divestiture communities listed in said Appendices D and E, Albany, Georgia is the largest, with 72,623 persons, and Hope, Arkansas is the smallest, with 8,810 persons (1970 Census). The average population of the 16 communities is 27,182.

Petitions for Reconsideration of these divestiture requirements were filed by the licensees of several of the affected stations. The American Newspaper Publishers Association ("ANPA") also sought reconsideration of the *Second Report and Order*, including its divestiture requirements. On May 28, 1975, the Commission adopted a *Memorandum Opinion and Order* affirming its *Second Report and Order*, including its divestiture provisions, and denying these Petitions for Reconsideration (JA 317).

All five respondents herein sought review of the *Second Report and Order* by the United States Court of Appeals for the District of Columbia Circuit (Case Nos. 75-1152, 75-1379, 75-1387, 75-1614 and 75-1618). They contended, *inter alia*, that the *Second Report and Order's* divestiture rule was arbitrary and capricious in significant respects, and that it was highly discriminatory and without record support to single out a handful of rural-area newspaper-broadcast groups as so "egregious" as to compel divestiture. On March 1, 1977, that court rendered its decision which affirms the prospective rules of the *Second Report and Order*, but vacates such portions thereof as have retroactive effect and deal with existing combinations. The court remanded the record to the Commission for adoption of a rule requiring divestiture of all co-located commonly owned newspaper-broadcast combinations, except those where the evidence clearly discloses that continued cross-ownership is in the public interest (JA 339, 435). In its April 5, 1977 decision on the Commission's motion for stay of the mandate, the court again expressly sustained the above position of respondents, holding that the few stations required to divest had received inconsistent administrative treatment; that the lines drawn between these stations "and all other present co-located combinations were arbitrary and capricious"; and that the treatment accorded the few divestiture cases was invalid "since the record contained no evidence that justified their disparate treatment" (JA 442).

ARGUMENT

I. The Court of Appeals' Invalidation of the FCC's Limited Divestiture Order Was a Lawful Exercise of Its Reviewing Authority and Involved No Improper Substitution of Judicial for Agency Judgment.

The Joint Respondents fully agree with the Commission that the Court of Appeals exceeded the bounds of proper judicial review of agency action when it reversed the Commission's decision to grandfather most existing local newspaper-broadcast combinations. The Commission was well within its statutory and constitutional authority,[1] and otherwise acted properly, in refusing to order divestiture in the absence of tangible public interest harm. In view of the record before the Commission, the agency's carefully articulated balancing of relevant policy considerations, and longstanding judicial approval of grandfathering as an entirely appropriate legislative and administrative practice,[2] it is quite clear that the Court of Appeals unlawfully substituted its judgment for the agency's when it rejected the Commission's choice of presumptions and held that "divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest" (JA 431).

The Court of Appeals' unmistakable preference for divestiture, and its unwarranted downgrading of the significance of the policies which the agency legitimately deemed decisive, gave it no license to usurp the rule making function delegated by Congress to the Commission

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[1] As documented in Briefs of Petitioners ANPA and NAB, there is solid authority for the proposition that the FCC lacks the requisite statutory and constitutional authority to impose *any* restrictions on newspaper ownership of broadcast stations. Under this analysis, which the Joint Respondents expressly support, even the Commission's prospective rules in this proceeding are invalid; *a fortiori*, the Commission was well advised to eschew across-the-board divestiture.

[2] *See, e.g.*, United States v. Maher, 307 U.S. 148, 153 (1939); Buckeye Cablevision v. FCC, 387 F.2d 220, 227-28 (D.C. Cir. 1967).

in this area. "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968). That a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem [of deciding whether the public interest will be served] to the latter." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946).

It by no means follows, however, as the Commission erroneously contends (Br. at 39-42), that the Court of Appeals' invalidation of the Commission's highly selective and idiosyncratic divestiture order—by which it required the dissolution by 1980 of 16 small-market newspaper-broadcast combinations—was at all inconsistent with these precepts. Indeed, this Court should view with considerable skepticism the Commission's contention that, in striking down the limited divestiture order, the Court of Appeals again unlawfully substituted its judgment for that of the agency and, what is worse, "rebalanced the scales to suit its own predilictions." FCC Brief at 39. If the Court of Appeals had simply followed its bias in favor of divestiture, it would have been expected to affirm, as a welcome first step, a divestiture ruling aimed at alleged "egregious" instances of media monopoly. That the court instead reversed Commission action conforming to what the court held was remedially required in *all* cases of newspaper-broadcast cross-ownership (except those where waivers are indicated) amply demonstrates that the court eschewed implementing its personal policy preferences when it set aside the limited divestiture order. Any lingering doubt on this score is resolved by the court's explicit observation, *in the nature of an alternate holding*, that "even if the Commission's [rather than its own] chosen presumption were supportable, its

current policy [of ordering divestiture in 16 selected markets] could not stand" (JA 429).

II. The Commission's Limited Divestiture Order Has No Support in the Record.

The limited divestiture order that the Commission defends as a rational exercise in line-drawing was nothing of the sort. As the Court of Appeals correctly held, there was nothing in the record which supported disparate treatment of the 16 affected combinations. The Commission conducted no hearings to enable it to assess actual conditions in the markets in question. Even assuming that individual hearings were unnecessary,[3] the Commissison was unable to point to anything in the written comments to substantiate its conclusion that, in these markets but in no others, the need for divestiture was "overwhelming" and the evidence of an absence of diversity was "unambiguous" (JA 207).

The lack of record support for this conclusion is entirely understandable, for the Commission never gave notice that it was considering a divestiture rule based on a standard of "egregiousness" that was and is highly suspect.[4] In fact, it was not until the rule making was

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[3] This Court, like the court below, need not decide this point (JA 392-93). It is raised simply to illustrate the inadequacy of the record on which the Commission premised its divestiture order.

[4] The Commission defends, as judicially approved, its novel "egregiousness" standard, which it equates with an "effective monopoly of local media" (FCC Br. at 29), by citing this Court's opinion in United States v. Radio Corp. of America, 358 U.S. 334, 351-52 (1959), where it was suggested that the public interest standard might not be met when "the publisher of the sole newspaper in an area applies for *the only available radio and television* facilities which, if granted, would give him a monopoly of that area's major media of mass communication." (emphasis added). The Court's standard is manifestly inapplicable to the situation in Albany, Georgia (to cite one example), where Gray Communications' "monopoly" competes with seven local radio stations and a

completed that the Joint Respondents had any inkling that the Commission had developed an "egregiousness" standard and had proceeded to examine, *in camera*, all known instances of combinations meeting its hitherto secret test (JA 201-09).

Thus, from a purely procedural standpoint, the Commission's limited divestiture rule was gravely flawed. The notice and comment provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, are by no means empty formalities. On the contrary, these requirements are necessary to assist judicial review and to provide fair treatment for persons affected by the rule. *Home Box Office, Inc.* v. *FCC*, —— F.2d ——, —— (D.C. Cir. No. 75-1280, *decided* March 25, 1977), *cert. denied*, 46 U.S.L.W. 3190 (October 3, 1977). To this end, there must be an "*exchange* of views, information and criticism between interested persons and the agency," and consequently, the notice required by the APA "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based." *Id.* The notices issued in the proceedings below were intolerably mute insofar as divestiture standards were concerned and, as a result, the opportunity for an exchange of views and information—so essential for a record upon which an informed judgment could be made—was irretrievably lost.

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cable television system. Thus, the Commission's definition of "effective monopoly" not only differs significantly from the Court's, but is lacking in any empirical justification in the record. *See also* Kuczo v. Western Connecticut Broadcasting Co., —— F.2d —— (2d Cir. No. 77-7111, decided October 27, 1977) (district court finding of media monopoly in Stamford, Conn. which ignored coverage by out-of-town radio stations reversed). The elusive nature of a workable definition of "effective monopoly" underscores the necessity for prior notice of, and an opportunity to comment on, the Commission's proposed standard—basic requirements which the FCC ignored in this proceeding.

III. The Commission's Limited Divestiture Requirement Was Arbitrarily Imposed without Consideration of the Very Factors Which Compelled the Agency to Grandfather Most Existing Newspaper-Broadcast Combinations.

Even if the Commission had not defaulted on its obligation to give notice of its proposals in a sufficiently "concrete and focused form so as to make criticism or formulation of alternatives possible" in advance of its decision,[5] *id.*, its limited divestiture order still could not have withstood judicial scrutiny. While the Commission undeniably has discretion to formulate classifications in rule making, this discretion must be exercised in an informed and rational manner. Here, however, the Commission's limited divestiture rule was grounded more in rhetoric than in the record and reflected distinctions that were palpably arbitrary.

For reasons that remain obscure, the Commission, in derogation of well-settled principles of reasoned decisionmaking, at no time explained why the same weighty public interest objectives that, on balance, led it to grandfather most existing cross-ownerships did not even merit consideration when it came to the 16 small-market

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[5] The Court of Appeals' opinion suggests that among the alternatives to small-market divestiture that might have been usefully explored was the possibility of additional station allocations or "drop-ins." Contrary to the FCC's assertion (Br. at 41), the court's focus on possible alternative remedies was entirely proper in light of the Commission's unconvincing demonstration of need for its limited divestiture rule. The court has admonished that "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). In this connection, it is important to note that the FCC expressly disavowed premising its divestiture rule on a finding of improprieties (JA 211) and, as the court noted, the record before it showed that in at least one of the markets where divestiture was ordered, Meridian, Mississippi, there was service from no less than 109 media outlets (JA 407 n. 80).

combinations singled out for what the Commission itself labels as the "drastic" remedy of divestiture (FCC Br. at 18). Regulatory action of this character, which bears the unmistakable imprint of an arbitrary double standard, is *prima facie* suspect. *Capitol Airways, Inc.* v. *CAB*, 292 F.2d 755, 758 (D.C. Cir. 1961). Long before this case, the Court of Appeals instructed the Commission that it must set forth a rational justification for reaching inconsistent results in similar cases, and it has consistently remanded litigation to the agency "when it did not take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike." *Garrett Broadcasting Service* v. *FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (denial of waiver of principal city coverage rule reversed because FCC's Review Board failed to reconcile its action with past decisional practice); *see also Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971) (fairness doctrine ruling reversed as inexplicably inconsistent with prior precedent); *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965) (denial of radio license renewal to producers of fraudulent quiz program reversed in light of contemporaneous action renewing licenses of national television network also connected with the deceptive practices); *Sunbeam Television Corp.* v. *FCC*, 243 F.2d 26 (D.C. Cir. 1957) (case remanded to FCC because of its apparent failure to apply consistent standards in comparative hearing).

Moreover, the court has emphasized that the Commission must "do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act." *Melody Music* v. *FCC*, *supra*, 345 F.2d at 733. This the Commission failed to do, notwithstanding its hollow assertion before this Court (FCC Br. at 39) that it followed "the classic approach of balancing the relevant public interest considera-

tions." If any such balancing occurred, the Commission managed to keep its reasoning processes a secret not only from the affected parties but from the Court of Appeals as well.

To be sure, the Commission took care to enumerate superficial factual differences between the 16 combinations it made subject to the divestiture requirement and the remaining combinations as to which it found that grandfathering would serve the public interest. For example, in the small television markets involved, the only daily newspaper published in the community apparently owned the only local television station licensed to serve that community with a city grade signal; in the remaining markets, the local newspaper-television combinations received competition from other local daily newspapers and/or other television outlets providing city grade coverage. In the *Second Report and Order*, the Commission explained the pertinence of this distinction as follows:

> "We were greatly concerned about a lack of diversity that reaches a point sufficient to constitute an effective monopoly in the marketplace of ideas as well as economically. This did not mean, for example, that no magazines or other periodicals entered the market, or that no other radio or television station could be received there. Aside from the fact that such media outlets often had only a tiny fraction in the market, they were not given real weight since they often dealt exclusively with regional or national issues and ignored local issues. If they did deal with locally oriented issues, it was their own locality that was the focus. Such a situation does not bespeak a real diversity on vital issues of local concern. In fact, it is local issues on which so much decision making by the electorate is required, and on which the level of diversity provided by incoming media is lowest. Accordingly, we made an effort to determine whether diversity, real community-wide diversity, was present on such topics of local concern." (JA 203).

If the Commission's *exclusive* mandate were to promote diversity of viewpoints on local issues and intermedia competition, there might have been a plausible basis for differentiating between the cross-ownership situation in the 16 affected markets and that in larger cities, assuming for argument's sake the existence of record evidence rationally supporting the distinction the Commission drew. *Cf. Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 859-60 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("[t]he need for diversity, and the danger of concentration, is not as great in Boston as in smaller markets").[6] But regardless of how one characterizes the Commission's concern for diversity and competition,[7] these statutory objectives are *not* the exclusive factors to be considered in determining whether divestiture would serve the public interest. As the Commission itself recognized, other statutory purposes must necessarily be considered.

Thus, in the *Second Report and Order*, the Commission held that, although it remained convinced of the importance of diversity, this was by no means the only factor to be weighed under the Act's public interest standard. More specifically, it stated:

> "There are a number of public interest consequences which form the basis of our concern. Requiring divestiture could reduce local ownership as well as the involvement of owners in management as many sales would have to be to outside interests. The continuity of operation would be broken as the new owner would lack the long knowledge of the community and would have to begin raw. Local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too. None of these points was given consideration when we spoke in more sweeping terms at an earlier stage of this proceeding." (JA 197).

[6] The Commission erroneously relies on dicta in *Greater Boston* as upholding its view that smaller rather than larger markets most likely experience a lack of diversity of views (FCC Br. at 41). *Greater Boston*, however, makes clear that diversification is but one of many statutory objectives to be considered by the Commission in carrying out its licensing responsibilities.

[7] The Commission alternately describes these concerns as "primary" and "secondary." Second Report and Order, JA 200. The Court of Appeals has also held that competition in broadcasting is not the exclusive, nor even necessarily the dominant, concern under the Act's public interest standard. Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958).

The Commission went on to say:

> "In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas. Particularly in connection with a number of entities, there is a long record of service to the public. Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough. Unlike for prospective rules, divestiture introduces the possibility of disruption for the industry and hardship for individual owners." (JA 197-98).

In deciding to attach decisive weight to such policies as stability, continuity and local ownership, the Commission was on sound legal terrain. Thus, with respect to applications for new stations, the Commission has stated that its licensing process is directed toward *two* basic objectives: diversification of ownership of the mass media and provision of the best practicable service to the public. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). Often these objectives are compatible. At other times, however, a choice be-

tween them must be made, and the Commission has on a number of occasions favored the applicant who held out the promise of providing superior service over an applicant whose attributes in terms of the diversification objective were more attractive. *See, e.g., Farragut Television Corp.*, 5 F.C.C.2d 93 (1966); *Historyland Radio*, 28 F.C.C. 69 (1960); *see also Pinellas Broadcasting Co.* v. *FCC*, 230 F.2d 204 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).

Where existing interests have been involved, the Commission's preference for stability and continuity over diversification has been even more pronounced, and has been judicially approved as both rational and within the Commission's authority under the Communications Act. *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, 702 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975). *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1211 (D.C. Cir. 1971); *Greater Boston Television Corp.* v. *FCC*, *supra*, 444 F.2d at 858.

For example, in *Greater Boston*, *supra*, the Court of Appeals recognized the legitimate expectancies of license renewal applicants, stating that "such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security." Similarly, in *Citizens Communications Center*, *supra*, the court appropriately observed that "the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." And in *Fidelity*, *supra*, the court held that, on an evenly balanced record, the Commission may properly assign decisive weight to a renewal applicant's past performance, however average or undistinguished.

Here, the Commission found that there was "an undramatic but nonetheless statistically significant superiority in newspaper-owned television stations in a number of program particulars" (*Second Report and Order*, JA

198 n. 26). This evidence amply supported the Commission's decision against an across-the-board divestiture requirement in the case of co-located newspaper-broadcast entities, especially since the idea of divestiture is a distinct departure from the Commission's typical approach of limiting new multiple ownership rules to prospective effect. Having decided, and properly so in view of its past decisional practice and the authorities discussed above, that stability, continuity, avoidance of hardship, and preservation of local ownership are statutory objectives with authentic claims of their own, the Commission could not have plausibily justified a general divestiture requirement.

In view of the Commission's eloquent exposition of the reasons why divestiture would ill serve the public interest, one would have expected it to provide a cogent explanation of why the same *balance* of policy considerations did not mandate grandfathered treatment of *all* existing local newspaper-television combinations. Yet, as previously observed, when it came to its discussion of why divestiture was required in 16 instances, the Commission did little more than resort to superficial factual distinctions. Moreover, it evidently proceeded on the assumption that diversification was the sole relevant criterion, even though it had resolutely stated elsewhere in its decision that it would be inappropriate to focus on that "abstract goal alone." (JA 197).

Like the Court of Appeals, this Court can search the *Second Report and Order* in vain for any indication that the Commission found, on balance, that the need for diversity in the 16 affected markets truly outweighed the need for stability and continuity of ownership. While the Commission's Brief asserts (at 39) that the agency found that the public would be harmed if these "egregious" situations were not broken up, its *Second Report and Order* is careful to disavow predicating its divestiture ruling on the existence of improprieties, of which

there was no evidence whatsoever (JA 211). It would thus appear that if the Commission did, in fact, engage in a balancing process, it did so *sub silentio*, contrary to fundamental requirements of reasoned decisionmaking. *See Greater Boston Television Corp.* v. *FCC*, *supra*, 444 F.2d at 851. If, on the other hand, the Commission deemed the policies which supported grandfathering inapplicable in the case of the "egregious" 16, it had a duty to say so and to explain why its resort to inconsistent decisional standards was not arbitrary.

This Court must know what a decision means before it becomes its duty to say whether it is right or wrong. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654 (1954). Too much is at stake in this proceeding to make guesswork on the Court's part permissible. *Radio Station KFH Co.* v. *FCC*, 247 F.2d 570 (D.C. Cir. 1957). As the Court of Appeals correctly held (JA 429-30), the differences between the numerous local newspaper-broadcast combinations accorded grandfathered treatment and the 16 singled out for divestiture are not so obvious—measured either in terms of diversity or in terms of hardship, stability or continuity of local ownership—as to excuse the Commission's failure to explain its inconsistent actions in the manner required by directly apposite judicial authority. *Melody Music, Inc.* v. *FCC*, *supra*.

In the absence of a more complete record, the Commission could not possibly have found that the need for stability and continuity in the 16 affected markets was outweighed by the need for increased diversity, let alone that the balance of policy considerations "overwhelmingly" required divestiture. Indeed, the very considerations which prompted the Commission to grandfather most existing combinations *may apply with even greater force, and may be even more compelling or persuasive*, in the smaller markets where divestiture was so callously

ordered.[8] Certainly, if the Commission thought otherwise, it had a duty to say so and to explain its reasoning.

In short, the Court of Appeals properly concluded that the limited divestiture rule could not be sustained under the tests laid down in *Melody Music* and related cases. The Commission's line-drawing exercise was indefensibly arbitrary, in view of its failure to explain the relevance of its distinction between markets like Watertown, New York or Albany, Georgia, and other larger centers of communications in terms of the *complete package* of statutory objectives and varied licensing goals it said it would (and generally did) consider in deciding the divestiture question.

Where, as here, the Commission itself recognizes that diversity is not the only point to consider, where it articulates the additional factors that are essential to an informed decision on divestiture, and where it then proceeds to ignore these same factors when decreeing the drastic remedy of divestiture in 16 miniscule markets in which no abuses were found, its action cannot be defended as a rational exercise of discretion. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971) (reviewing court must consider, as the Court of Appeals did here, whether the administrative decision was based on a consideration of all relevant factors and whether there has been a clear error of judgment).

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[8] As shown in the introduction, each of the Joint Respondents has deep local roots, and none publishes a daily newspaper outside of the area it is licensed to serve with its broadcast station(s). For these small-market combinations, "swapping" of broadcast facilities with other affected publishers may not be a feasible or possible means of avoiding the hardship and economic dislocation that would accompany uprooting of long-established local ownership and service through forced divestiture (*See* Second Report and Order, separate statement of Commissioner Robinson, JA 305).

CONCLUSION

Insofar as it vacated the FCC's limited divestiture rule, the judgment of the Court of Appeals should be affirmed; in all other respects, it should be reversed.

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Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, 76-1685

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Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, CHANNEL TWO TELEVISION COMPANY, *et al.*, NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, ILLINOIS BROADCASTING CO., *et al.*, THE POST COMPANY, *et al.*,

Petitioners

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC.

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INDEX

	Page
Statement of the Case	2
Summary of Argument	2
Argument	3
Conclusion	6

CITATIONS

Cases:

Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971)	5
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940)	5
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943)	5

Statute:

5 U.S.C. § 706(2)(A)	5

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1521

CHANNEL TWO TELEVISION COMPANY, *et al.*,
Petitioners
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioners
v.
FEDERAL COMMUNICATIONS COMMISSION

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Petitioner
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

No. 76-1624

ILLINOIS BROADCASTING CO., *et al.*,
Petitioners
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*

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BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC.

STATEMENT OF THE CASE

American Broadcasting Companies, Inc. (ABC) considers the Statement contained in the Brief of Petitioner Federal Communications Commission (Commission) to be an accurate description of the underlying proceedings.

SUMMARY OF ARGUMENT

The most important issue before this Court is the Court of Appeals requirement that the Commission mandate

divestiture in order to separate co-located newspaper/broadcast crossownerships. ABC, which operates a national television network and five owned television stations as well as radio networks and owned radio stations, considers the subject Court of Appeals action to be unjustified judicial intrusion into a function entrusted by law to the Commission. Moreover, ABC's own broadcast experience, which is comprehensive, supports the general conclusion that newspaper/broadcast crossownerships are not abusive or contrary to the public interest.

ARGUMENT

A. Introduction

ABC, although not a newspaper publisher, has had considerable experience with co-located daily newspapers and broadcast stations. For example, a number of television stations affiliated with the ABC Television Network are owned by companies which publish a daily newspaper in the same community, and many ABC affiliates which are not newspaper co-owned compete with NBC and CBS affiliates which are newspaper owned. In addition, ABC owned television stations in New York, Chicago, San Francisco and Detroit all compete with television stations in those communities which are under common ownership with a daily newspaper. Similar conditions exist with respect to ABC's radio network operations and owned stations.

ABC's interest in this proceeding is with the preservation of a sound television and radio industry structure—consistent with legitimate public interest concerns. Because of its somewhat detached perspective on the issues before the Court, ABC is hopeful that these views will be of particular assistance to the Court.

B. The Court of Appeals Usurped Commission Prerogative In Requiring Divestiture

From ABC's perspective, the most important issue here involved is whether the Commission abused its discretion in not requiring, except in certain extreme situations, the breakup of co-located newspaper/broadcast crossownerships. The Court of Appeals ruled that the Commission must require such breakup unless a waiver of the requirement is justified. In effect, the Court of Appeals reversed the Commission's presumption against forced divestiture.

The Commission concluded that the future structure of the broadcast industry would be enhanced if no *new* newspaper/broadcast crossownerships were created and if existing crossownerships were broken up when the newspaper or broadcast station might be sold to a new owner. Its judgment was based largely upon theoretical concerns with diversification, as there was little evidence that newspaper/broadcast crossownerships have resulted in competitive abuses or deleterious broadcast service; indeed, the record showed that newspaper owners have run some of the best broadcast stations from the standpoint of public service. At the same time, the Commission concluded that the draconian remedy of forced divestiture, with unpredictable and possibly undesirable consequences, should not be adopted.

While ABC does not agree with the Commission that new newspaper/broadcast crossownerships should be prohibited, that is not the issue with which ABC is here concerned. In ABC's judgment, the critical issue is who is to decide communications policy questions of this sort—the Commission or a reviewing court. With respect to divestiture, we think the answer is very clear; the function at issue should be left to the administrative agency.

The Commission's judgment in this matter, after a full and comprehensive rulemaking proceeding in which a wide range of viewpoints was heard, is precisely the kind of function which our system entrusts to the administrative agency. Judicial review is limited and narrow. It is not the function of the reviewing court to substitute its judgment for that of the agency. 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Yet that is precisely what the lower court did in this case.

The Court of Appeals reasoned that the Commission's desire for an improved industry structure was inconsistent with not requiring forced divestiture. Such reasoning is overly simplistic. The task before the agency was to balance various public policy considerations and fashion a remedy appropriate in all of the circumstances. The so-called inconsistency is nothing more than a recognition that the public interest benefits associated with improved industry structure weighed more heavily in the balancing process when forced divestiture, with its attendant detriments, was not involved.

C. ABC's Experience Confirms That Newspaper/Broadcast Crossownerships Have Not Been Abusive

ABC's experience confirms that as a general matter common ownership of a co-located newspaper and broadcast station is not injurious to the public interest. For example, ABC is aware of those of its television network affiliates which are under common ownership with a newspaper, and it is aware of the affiliates of the other two national television networks with which its affiliates compete which are under such common ownership. ABC's general experience has been that abuses of position are not present.

ABC's experience on the television network level is also confirmed by its experience in the operation of five television stations in major markets, which in four instances compete with stations that are newspaper-owned. ABC owned television stations are not at a competitive disadvantage in competing with television stations under common ownership with a co-located newspaper.

Similarly, ABC's experience in operating radio network services plus owned radio stations in seven communities supports the judgment that co-located and commonly owned newspapers and radio stations in general are operated in the public interest and not in an abusive fashion.

CONCLUSION

ABC respectfully urges this Court to reverse the Court of Appeals decision insofar as it failed to affirm the Commission's decision against wholesale forced divestiture of co-located newspaper/broadcast crossownerships.

Respectfully submitted,

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No. 76-1471
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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
I. The Commission's order was lawful and rational	1
II. NCCB and the Department have not shown that the Commission's decision not to require across-the-board divestiture was erroneous	4
III. NCCB's further attempts to defend the court below are without merit	8
IV. Gray has not shown that the commission's limited divestiture rules were erroneous	9

CITATIONS

Court decisions:

Ashbacker Radio Co. v. *FCC*, 326 U.S. 327 (1945) 5

Crowder v. *FCC*, 390 F. 2d 369 (D.C. Cir.), *cert. denied*, 393 U.S. 962 (1968) 4

United States v. *Radio Corp. of America*, 358 U.S. 334 (1959) 8

Agency decisions:

Douglas Florida Broadcasting, Inc., 62 FCC 2d 953 (1977), *appeal pending sub nom. General Florida Enterprises, Inc.* v. *FCC*, No. 76-1742 (D.C. Cir.) 7

Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 (1943) 2

Multiple Ownership Rules (Docket No. 6987), 16 FCC 288 (1953) 2

Multiple Ownership Rules (Docket No 14711), 45 FCC 1476 (1964) 2

Multiple Ownership Rules (Docket No. 16068), 22 FCC 2d 696 (1968) 2

Multiple Ownership Rules (Docket No. 18110) 50 FCC 2d 1046 (1975) 2

Multiple Ownership Rules (Docket No. 20548) 68 FCC 2d 824 (1977) 2

Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944) .. 2

Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) 7

Report on Chain Broadcasting (1941) 2

Rules and Regulations Governing Television Broadcast Stations, 6 Fed. Reg. 2284 (1941) 2

Rules Governing High Frequency Broadcast Stations, 5 Fed. Reg. 2382 (1940) 2

Seven (7) League Productions, Inc., 1 FCC 2d 1597 (1965) 7

253-716—78——1

	Page
Statute:	
Administrative Procedure Act, 80 Stat. 381, as amended:	
5 U.S.C. § 553(b)(3)	9
Communications Act of 1934, 48 Stat. 1064, as amended:	
47 U.S.C. § 307(d)	3
47 U.S.C. § 310(b)	5
Miscellaneous:	
1 K. Davis, *Administrative Law* § 7.02 (1952)	4
H.R. Rept. No. 1750, 82d Cong., 2d Sess. (1952)	3
S. Rept. No. 44, 82d Cong., 1st Sess. (1951)	3

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF [1]

The following comments are submitted in reply to the briefs of respondents National Citizens Committee for Broadcasting (NCCB), the Department of Justice (the Department) and Gray Communications Systems, Inc. (Gray).

I. THE COMMISSION'S ORDER WAS LAWFUL AND RATIONAL

The FCC first adopted multiple ownership rules almost forty years ago. Since then, the Commission has amended these

[1] This reply is being filed initially in typewritten form because of the extreme difficulty of making a timely delivery to the printer under the circumstances of this case, which included receipt of the Department's brief eight days late.

rules on numerous occasions, broadening and strengthening them so as to respond to changing industry conditions and to reflect the agency's accumulating experience. Throughout this process, the Commission's objective has been to encourage diversified ownership of media in order to promote competition and diversity of expression. At the same time, where the Commission has confronted existing licensees who have proven records of service in the public interest, the Commission has not lost sight of the desirability of preserving this service. In general, therefore, the agency has applied its rules prospectively only, and has given proper attention to established records of service.[2]

After weighing the relevant policy factors in light of the record and its licensing experience, the Commission in this case decided to impose a prospective ban on co-located newspaper-broadcast combinations, but to eschew divestiture except in cases of effective monopoly. The fact that the Commission did not order across-the-board divestiture did not mean that it had departed from its long-standing view that diversification was a very important regulatory goal. It simply meant that the agency had not found sufficient justification for applying that

[2] There was no divestiture required in connection with the Commission's "overlap" rules, *see* 45 FCC 1476, 1478 (1964); its "one to a market" rules, *see* 50 FCC 2d 1046, 1075 (1975) (Note: this is the order under review, but no party has challenged this aspect of the Commission's decision); or its "regional concentration" rules, *see* 63 FCC 2d 824, 829 (1977). In addition, the agency's "7-7-5" rules were specifically designed to minimize the need for divestiture, *see* 18 FCC 288, 295 (1953). So too, in some respects, were the "chain broadcasting" rules, *see Report on Chain Broadcasting* 67-68 (1941). The original FM and TV "duopoly" rules were necessarily prospective only, since these services had not then developed, *see* 5 Fed. Reg. 2382 (1940) and 6 Fed. Reg. 2284 (1941). And of course, there was no divestiture ordered when the Commission decided to pursue its multiple ownership objectives on a case-by-case basis rather than rule; *e.g.*, in the first "newspaper-broadcast" proceeding, *see* 9 Fed. Reg. 702 (1944), and in the "top 50 markets" proceeding, *see* 22 FCC 2d 696 (1968). Thus, the only time the Commission made no distinction between existing and future licensees was when it adopted the original AM "duopoly" rules, *see* 8 Fed. Reg. 16065 (1943), and even then it afforded an opportunity for case-by-case review.

policy so as to override all other public interest considerations. Since there was nothing in the Constitution or the Communications Act that compelled the Commission to attach overriding significance to diversification under all circumstances, this decision was unquestionably lawful.

The decision was also eminently rational. The record in this proceeding did not reveal any pattern of harm from cross-ownership, but it did reveal that many newspaper-owned stations had long records of service in the public interest, and many of these station owners had community ties arising out of local residence. It was clear, moreover, that divestiture would disrupt this proven, relied upon service, and would also work a hardship on the licensees who had invested time and money in delivering this service by destroying their legitimate renewal expectancies.[3]

At the same time, while the Commission presumed that diversity could be expected to increase if there was separate ownership, it recognized that this was an "abstract" goal because, as the court later put it, there was "no guarantee" that the presumed effect would follow. 50 FCC 2d at 1078 (App. 197); 555 F. 2d at 950 (App. 373). Finally, the Commission feared that in the event of divestiture, many new owners would have to borrow large sums of money at high interest rates and

[3] The 1952 amendments to the Communications Act make it clear that such expectancies are legitimate. In that year, Congress deleted that part of Section 307(d) of the Act which provided that action on renewal applications "shall be limited to and governed by the same considerations and practice which affect the granting of original applications," and substituted a provision that renewals "may be granted * * * if the Commission finds that public interest, convenience and necessity would be served reason for the change was that the deleted portion was "neither realistic thereby." The House Report accompanying this legislation stated that the nor [did] it reflect the way in which the Commission has actually handled renewal cases," H.R. Rep. No. 1750, 82d Cong., 2d Sess., 8 (1952), and the Senate Report added that the Commission had "the right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the overall performance of that station against the broad standard of public interest, convenience and necessity." S. Rept. No. 44, 82d Cong., 1st Sess. 7 (1951).

that this could possibly affect program quality.[4] In light of all this, the Commission concluded that it just did not make sense to order across-the-board divestiture.

II. NCCB AND THE DEPARTMENT HAVE NOT SHOWN THAT THE COMMISSION'S DECISION NOT TO REQUIRE ACROSS-THE-BOARD DIVESTITURE WAS ERRONEOUS

Because the Commission's refusal to require massive divestiture was both lawful and rational, it should have been upheld by the court below. That body, however, substituted its judgment and reversed the agency. Both NCCB and the Department support this action by the court.[5] In attempting to defend it, however, they commit numerous errors of fact, law and logic. A discussion of some of these errors follows.

A. NCCB adopts the position of the court below that the Commission's reasons for not ordering full divestiture were insufficient to overcome a "presumption" against cross-ownership. NCCB br. at 28–29, 45. The Commission has already demonstrated, however, that there is no such presumption against existing cross-owners. FCC Pet. br. at 33–37.

B. NCCB claims that the Commission improperly placed the burden of proof in this proceeding on "those who sought diversification over concentration." NCCB br. at 28. It is true that the Commission believed that divestiture should not be required without a strong showing of need. It is clear, however, that the Commission imposed no burden of proof on any party. Its actions were based mainly on what Professor Davis would term the finding of "legislative facts," see 1 K. Davis, *Administrative Law* § 7.02 (1958), rather than on any

[4] The D.C. Circuit, albeit in the context of trafficking, has stated that this is a legitimate concern: "Trafficking * * * may inflate the price of a station so that only wealthy individuals or businesses will be eligible transferees. *And it may lead the new ownership, in an attempt to recover its investment, to decrease the quality of its programming* while increasing the quantity of its commercials—all at the expense of public audiences." *Crowder* v. *FCC*, 399 F. 2d 569, 572, *cert. denied.*, 393 U.S. 962 (1968) [emphasis added.]

[5] The two respondents do not agree, however, as to certain other aspects of the court's decision. *See* part III, *infra*.

party's success or failure in meeting a predetermined burden.

C. NCCB contends that the Commission has "regularly" ordered divestiture in connection with its multiple ownership rules. The record clearly shows, however, that divestiture has been an exceptional remedy. *See* n. 1, *supra*.

D. NCCB objects to the Commission's taking local ownership into account as a factor weighing against divestiture. Yet in its Further Comments submitted during the course of this proceeding, NCCB correctly referred to the Commission's "long standing preference for local ownership." (App. 860). *See* letter M, *infra*.

E. NCCB also asserts that the Commission's fears of a decline in local ownership are groundless because "there is no reason to suppose that local entrepreneurs will not find television an attractive investment." NCCB br. at 33, citing 555 F. 2d at 964 (App. 421). But existing cross-owners under orders to divest, particularly those interested in swapping stations with other cross-owners, would not have to deal with these local entrepreneurs, but could sell to or swap with whomever they wished, since under Section 310(b) of the Communications Act, the Commission is barred from denying a transfer application because the public interest might be better served by someone other than the proposed transferee. Given this constraint, it was entirely reasonable for the Commission to follow the course that was least likely to result in increased absentee ownership.

F. NCCB attacks the Commission's contention that licensees who serve the public interest have legitimate license renewal expectancies by contending that "the same public interest criterion applies to both initial and renewal applications." NCCB br. at 40. In so stating, NCCB relies on certain language in *Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327, 332 (1945). But this language was explicitly predicated on a portion of § 307(d) of the Communications Act *which has since been repealed by Congress. See* n. 2, *supra*.

G. NCCB avers that the Commission's concern for protecting "legitimate license renewal expectancies" serves only the private interests of licensees. NCCB br. at 39 n. 50. It has long

been recognized, however, that such expectancies also serve the public interest by providing licensees with the incentive to invest in quality programming rather than simply to maximize profits. The Department disagrees with NCCB on this point. Dept. br. at 49. *Cf.* n. 3 *supra*.

H. NCCB contests the Commission's statement that divestiture would disrupt proven service, claiming that this is directly contradicted by the agency's finding that the above average performance of newspaper-owned stations "was in no way shown to be the result of the fact of owning a newspaper." NCCB br. at 35, citing 53 FCC 2d 592 (App. 324). What finally counts, however, is that, for whatever reasons, these stations have performed well enough to win repeated license renewals and indeed have performed better as a class than other stations in several important areas. That such performance was not shown to be the result of newspaper ownership is immaterial.

I. The Department contends that the Commission's reasons for not ordering full divestiture "appear insubstantial," Dept. br. at 36, 51—but the Department has no special expertise in communications. Instead, the Department, which also argued for general divestiture before the Commission and the court below, is simply seeking to substitute for the agency's policy balance one more nearly to its liking.[6]

J. The Department characterizes the most significant part of the Commission's argument against divestiture—its concerns for the continuity of existing meritorious service and for fairness to existing licensees—as arguments of counsel. Dept. br. at 45–51. But in fact the special merit and the equities of existing cross-owners as a group are clearly recognized in paragraph 109 of the Commission's Second Report and Order. That paragraph shows that these concerns were not *post hoc* rationalizations, but were—from the outset—at the very heart of the Commission's decision against an order of general divestiture. 50 FCC 2d at 1078 (App. 197–198).

[6] The court below rejected the Department's arguments, which were based on antitrust policy. 555 F. 2d at 965 n. 107 (App. 427–428). The Department now seems to have abandoned this theory of the case.

K. The Department adverts to an alleged Commission claim that incumbency alone gives a broadcaster an interest in maintaining his license, Dept. br. at 46, and proceeds to demolish this straw man by quoting numerous precedents to the effect that the grant of a broadcast license confers no vested right. Later, however, the Department admits that the Commission never made any such statement. *Id.* at 49 n. 41 ("The Commission . . . speaks of renewal expectancies only for licensees that have 'given good service.'")

L. Both NCCB and the Department reiterate the reasoning of the court below that the Commission's policy on divestiture is at odds with its policy on transfers. 555 F. 2d at 963, 964, 965 (App. 420, 423, 425); NCCB br. at 33, 34, 38; Dept. br. at 42–44. But as previously stated (FCC Pet. br. at 34, 38), the Commission grants voluntary transfers because it recognizes that forced obligations would not result in conscientious service. This scarcely demonstrates, however, that its reluctance to order divestiture by licensees who want to remain in broadcasting is irrational. Indeed, it is all the more reason to prize continuity of proven service where it can be found.

M. Both NCCB and the Department refer to the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), in their attempts to prove that the Commission's order is irrational. *E.g.*, NCCB br. at 32, 45; Dept. br. at 5. But that *Policy Statement* was intended for use in choosing among *new* applicants for broadcast facilities, and the Commission has held that the statements contained therein as to the weight to be accorded various factors are inapplicable in situations involving existing licensees. *Seven (7) League Productions, Inc.*, 1 FCC 2d 1957, 1599 (1965); *Cowles Florida Broadcasting, Inc.*, 62 FCC 2d 953, 955–57 (1977), *appeal pending sub nom., Central Florida Enterprises, Inc.* v. *FCC*, No. 76–1742 (D.C. Cir.). Accordingly, it is of no significance here that the *Policy Statement* gives little credit to new applicants for local ownership *per se*, or for "past broadcast record" *at other stations*.

N. Finally, both NCCB and the Department imply that the Commission's "real" reason for not ordering widespread divestiture was its fear that selling prices would be reduced, thus

causing licensees to suffer economic loss. NCCB br. at 38; Dept. br. at 40. Simply stated, this is a red herring. The Commission never made this suggestion; in fact, its view was that licensees would *not* lose money as a result of divestiture. 50 FCC 2d at 347–348 (App. 118–119).

III. NCCB'S FURTHER ATTEMPTS TO DEFEND THE COURT BELOW ARE WITHOUT MERIT

NCCB (but not the Department) also insists that the Commission's standards for divestiture and for "*ad hoc* challenge" are irrational.[7] As to the former, NCCB's argument appears to be that the Commission purported to set a "monopoly" standard, but did not use antitrust criteria, NCCB Br. at 47. However, the word "monopoly" has meaning in contexts other than antitrust, and as the court below recognized, antitrust policy is only one component of the Commission's broad public interest mandate. 555 F. 2d 965 n. 107 (App. 427–428), citing *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959). On the latter point, NCCB, like the court below, seems to be under the mistaken impression that the Commission has limited those challenging a cross-owner's license renewal to a showing that the licensee's conduct violated the Sherman Act. *E.g.*, NCCB br. at 47 n. 62, 50–51; 555 F. 2d at 966 n. 108 (App. 428–429). In truth, however, the Commission has limited such challengers only to the extent that it will not permit them to reargue in an adjudicatory setting the question already decided in this rulemaking, *i.e.*, in what circumstances is the continued existence of co-located newspaper-broadcast combinations *per se* undesirable. The Commission has not foreclosed consideration of any acts of abuse alleged to arise out of cross-ownership. Its reference to the Sherman Act was only meant to indicate that, in addition to such other allegations of harm as might be presented, it would also consider, in the light of its broad public interest mandate, charges of economic monopoli-

[7] The Department agrees with the Commission that the court erred in vacating the limited divestiture rules. Dept. br. at 51, n. 44. The Department does not address the "*ad hoc* challenge" issue.

zation of the type proscribed by the antitrust laws. 50 FCC 2d at 1088 (App. 218).[8]

Finally, NCCB claims that "the Court of Appeals left the Commission with discretion as to the particular form any rule on remand would take." NCCB br. at 57. The Commission has demonstrated, however, and the Department agrees, that the court below did deprive the Commission of that discretion. FCC Pet. br. at 42; Dept. br. at 52. Indeed, the court has admitted that it "ordered the Commission to take further steps to ensure that everyone would be consistently treated under the standard already adopted for new license applicants." Opinion on Motion for Stay of Mandate, 555 F. 2d 967, 969–970 (App. 443). Accordingly, there can be no doubt that the court below has usurped an administrative function.

IV. GRAY HAS NOT SHOWN THAT THE COMMISSION'S LIMITED DIVESTITURE RULES WERE ERRONEOUS

Respondents Gray, *et al.*, who include five of the sixteen licenses affected by the Commission's limited divestiture rules, support the vacation of these provisions by the court below. Initially, Gray asserts that the Commission never gave notice that it was considering the adoption of rules based on a standard of effective monopoly. Gray br. at 9–10. But the Commission's Further Notice of Proposed Rulemaking clearly satisfied the APA, 5 U.S.C. § 553(b)(3), and in any event, the agency's 1974 memorandum opinion and order specifically invited additional comments on whether divestiture should be limited to markets "with a specific number of separate media voices." 22 FCC 2d 763, 769 (App. 129).

Gray also argues that the Commission did not consider the adverse consequences of divestiture in the cases of those licensees ordered to divest. Gray br. at 11, 17–18. But of course,

[8] Newspaper cross-owners are also subject, of course, to the Commission's other multiple ownership rules and policies. Moreover, the Commission has retained diversification as a factor weighing in favor of a new applicant challenging an incumbent licensee. In any case, though, only the Commission's newspaper-broadcast rules are now before this Court. The agency's treatment of adjudicatory license renewal challenges is not at issue.

the Commission did not consider these adverse consequences in all cases. On balance, however, it determined that where there was not even one other voice which could reasonably be expected to compete effectively with a cross-owner and to provide a "juxtaposing" of views on local issues, divestiture was the course of action that would best serve the public interest. 50 FCC 2d at 1081, 1083 (App. 203–207); *see generally id.* at 1078–1087 (App. 196–214).

* * * * * * *

For the reasons stated above and in its other pleadings before this court, petitioner again requests that its orders be affirmed and the judgment of the court below reversed.

Respectfully submitted,

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NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

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AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

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ILLINOIS BROADCASTING COMPANY, INC., ET AL., PETITIONERS

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

THE POST COMPANY, ET AL., PETITIONERS

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statement	4
A. Background	4
B. The Commission's decision	7
C. The Court of appeals' decision	11
Introduction and summary of argument	13
Argument	21
I. The Commission has the authority to prohibit co-located newspaper-broadcast combinations	21
A. The First Amendment does not require that newspapers be allowed to own broadcast stations in their circulation area	21
B. The Commission's rules are not discriminatory	25
C. The Communications Act authorizes the Commission's rules	27
II. The rule prohibiting the creation of new co-located newspaper-broadcast combinations is a reasoned and reasonable exercise by the Commission of its mandate to grant licenses in the public interest	30
III. The Commission did not adequately justify its decision to treat existing co-located newspaper-broadcast combinations differently from proposals to create new combinations	33

252-966—77

Page

A. The Commission has acted on the premise that promotion of diversity is an important element of the public interest---------- 33
B. The interests on which the Commission relied to support its grandfathering decision appear insubstantial for that purpose, and the Commission did not adequately explain why those interests outweigh the value of diverse media ownership---------- 36
1. Preserving local ownership and owner involvement with management------- 37
2. Avoiding economic dislocation ---------- 39
3. Continuity of service------ 43
4. Other justifications------- 45
IV. The court of appeals should have remanded the case to allow the Commission to reconsider its decision in light of the proper legal standards---------- 52
Conclusion ---------- 53

CITATIONS

Cases:

Andrew G. Nelson, Inc. v. *United States*, 355 U.S. 554---------- 47
Ashbacker Radio Co. v. *Federal Communications Commission*, 326 U.S. 327---------- 40–41, 48
Associated Press v. *United States*, 326 U.S. 1-- 16, 23, 24, 31
Atchison, Topeka & Santa Fe Railway Co. v. *Wichita Board of Trade*, 412 U.S. 800------ 35

Cases—Continued

Page

Berger v. *Board of Psychologist Examiners*, 521 F. 2d 1056---------- 47
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281---------- 35
Buckley v. *Valeo*, 424 U.S. 1---------- 25
Burlington Truck Lines v. *United States*, 371 U.S. 156---------- 41, 45
Califano v. *Sanders*, 430 U.S. 99---------- 29
Citizen Publishing Co. v. *United States*, 394 U.S. 131---------- 23
Citizens Communications Center v. *Federal Communications Commission*, 447 F. 2d 1201----- 48–49
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402---------- 35
City of New Orleans v. *Dukees*, 427 U.S. 297-- 20, 47
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94----- 24, 26
Elrod v. *Burns*, 427 U.S. 347---------- 24, 25
Federal Communications Commission v. *Allentown Broadcasting Co.*, 349 U.S. 358-------- 14
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134--------- 33
Federal Communications Commission v. *Sanders Brothers Radio Station*, 309 U.S. 470----- 19, 40, 48
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17---------- 52
Federal Radio Commission v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266--------- 48
Greater Boston Television Corp. v. *Federal Communications Commission*, 444 F. 2d 841, certiorari denied, 402 U.S. 923---------- 49
Illinois Brick Co. v. *Illinois*, 431 U.S. 720----- 29
Lorain Journal Co. v. *United States*, 342 U.S. 143 ---------- 23

Cases—Continued

	Page
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241	21
McClatchy Broadcasting Co. v. *Federal Communications Commission*, 239 F. 2d 15, certiorari denied, 353 U.S. 918	5, 27
National Broadcasting Co., Inc. v. *United States*, 319 U.S. 190	15, 24
National Labor Relations Board v. *Food Store Employees*, 417 U.S. 1	52
Paris Adult Theatre I v. *Staton*, 413 U.S. 49	32
Police Department of Chicago v. *Mosley*, 408 U.S. 92	24, 25
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367	25, 26
Regional Rail Reorganization Act Cases, 419 U.S. 102	29
Scripps-Howard Radio v. *Federal Communications Commission*, 189 F. 2d 677 certiorari denied, 342 U.S. 830	5, 14–15, 27
Securities and Exchange Commission v. *Chenery Corp.*, 318 U.S. 80	41, 45
South Prairie Construction Co. v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800	52
Speiser v. *Randall*, 357 U.S. 513	25
United States v. *Greater Buffalo Press, Inc.*, 402 U.S. 549	22
United States v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4	20, 47
United States v. *Midwest Video Corp.*, 406 U.S. 649	50

Cases—Continued

	Page
United States v. *Pierce Auto Freight Lines*, 327 U.S. 515	46
United States v. *Radio Corp. of America*, 358 U.S. 334	16, 23, 27, 51
United States v. *Southwestern Cable Co.*, 392 U.S. 157	29
United States v. *Storer Broadcasting Co.*, 351 U.S. 192	14, 17, 27, 28, 32
United States v. *Wise*, 370 U.S. 405	29
United States v. *Wurzbach*, 280 U.S. 396	27
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1	47
Virginia State Board of Pharmacy v. *Virginia Citizens Consumers Council*, 425 U.S. 748	24
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609	28
Whalen v. *Roe*, 429 U.S. 589	32
Agency decisions:	
Applications for Voluntary Assignments or Transfers of Control, 25 Fed. Reg. 12898	44
A. H. Belo Broadcasting Co., 47 F.C.C. 2d 540	5
First Report and Order, 22 F. 2d 306	5–6
Further Notice of Proposed Rulemaking (Docket 18110), 22 F.C.C. 2d 339	6
High Frequency Broadcasting Stations (FM), 6 Fed. Reg. 1580	4
Memorandum Opinion and Order: Multiple Ownership (Docket 18110), 12 F.C.C. 2d 912	5

Cases—Continued Page
Notice of Proposed Rule Making: Multiple Ownership (Docket 18110), 33 Fed. Reg. 5315 ---- 5
Order 84–A: Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 ---- 4, 14, 51
Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393---- 5, 14
Procedures on Transfer and Assignment Applications, 32 F.C.C. 689 (1962)---- 44
Second Report and Order, 50 F.C.C. 2d 1046 ---- 7, 35
Section 214 Certificates, 21 F.C.C. 2d 307, affirmed *sub nom. General Telephone Co. of Southwest* v. *United States*, 449 F. 2d 846 ---- 51
Seven (7) League Productions, Inc., 1 F.C.C. 2d 1597---- 5, 15
WHDH, Inc., 16 F.C.C. 2d 1, 17 F.C.C. 2d 856, affirmed *sub nom. Greater Boston Television Corp.* v. *Federal Communications Commission*, 444 F. 2d 841, certiorari denied, 403 U.S. 923---- 5
Constitution and statutes:
United States Constitution:
First Amendment---- *passim*
Fifth Amendment---- 25
Communications Act of 1934, Title III, 48 Stat. 1081, as amended, 47 U.S.C. 301 *et seq.*:
Section 301, 47 U.S.C. 301---- 20, 48
Section 304, 47 U.S.C. 304---- 48
Section 307(a), 47 U.S.C. 307(a)---- 13

Congressional materials—Continued Page
Internal Revenue Code of 1954, Section 1071, 26 U.S.C. 1071---- 7
5 U.S.C. 06---- 35
Miscellaneous:
Economic Report of the President, January 1977---- 40
9 Fed. Reg. 702 (1944)---- 4
1964 Multiple Ownership Rules, 2 R.R. 2d 1588 ---- 24
RAND Corporation Study, R–1584–NSF-- 8
RAND Corporation Study, R–1585–MF--- 9, 35
Washington Post, December 7, 1977---- 7

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

No. 76-1624

ILLINOIS BROADCASTING COMPANY, INC., ET AL., PETITIONERS
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

No. 76-1685

THE POST COMPANY, ET AL., PETITIONERS
v.
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 339–431) is reported at 555 F. 2d 938. The opinion on the Commission's motion for stay of mandate (A. 435–444) is reported at 555 F. 2d 967. The orders of the Commission (App. 134–316, 317–336) are reported at 50 F.C.C. 2d 1046 and 53 F.C.C. 2d 589.

JURISDICTION

The judgment of the court of appeals (A. 432–434) was entered on March 1, 1977. The petition for a writ of certiorari in No. 76–1471 was filed on April 22, 1977. The petition in No. 76–1521 was filed on May 2, 1977, the petition in No. 76–1595 on May 13, the petition in No. 76–1604 on May 16, the petition in No. 76–1624 on May 20, and the petition in No. 76–1685 on May 27. The petitions were granted and the cases were consolidated on October 3, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has the authority to adopt a rule that would prohibit the issuance or transfer of any broadcast license to a person who controls a daily newspaper published in the community to which the broadcast license pertains.

2. Whether the Commission's decision not to allow the creation of new co-located newspaper-broadcast combinations was arbitrary or unreasonable.

3. Whether the Commission's decision to insulate existing non-monopoly newspaper-broadcast combinations from challenge was a rational application of the Commission's own principles.

4. Whether the court of appeals exceeded its authority by ordering the Commission to adopt a rule requiring the separation of existing newspaper-broadcast combinations rather than simply remanding the case to the Commission.

STATEMENT

A. BACKGROUND

The Federal Communications Commission for many years has recognized that diversity in the sources of public information serves the public interest. Since the early 1940s the Commission has prohibited any party from owning or controlling more than one broadcast station in the same broadcast service in the same area. See, *e.g., Order 84–A: Multiple Ownership of Standard Broadcast Stations,* 8 Fed. Reg. 16065 (1943).[1] The Commission early held that diversification of mass media ownership is important. The Commission allowed newspapers to acquire local broadcast licenses when necessary to promote broadcasting;[2] but where there have been competing applicants, the Commission, in order to promote diversity of media ownership, in appropriate cases has refused

[1] In *Order 84–A* the Commission barred ownership of more than one AM radio station in the same community by the same person; it ordered the separation of all existing combinations within six months. *Id.* at 16065.

[2] An early investigation of the propriety of newspaper ownership of FM stations ended without the adoption of any rules, but the Commission stated that it would consider the issue on a case-by-case basis. *High Frequency Broadcasting Stations (FM)*, 6 Fed. Reg. 1580, 3302 (1941); 9 Fed. Reg. 702 (1944).

to grant a broadcast license to a person controlling or publishing a newspaper in the same city. See, *e.g., Scripps-Howard Radio* v. *Federal Communications Commission,* 189 F. 2d 677 (C.A. D.C.), certiorari denied, 342 U.S. 830; *McClatchy Broadcasting Co.* v. *Federal Communications Commission,* 239 F. 2d 15 (C.A. D.C.), certiorari denied, 353 U.S. 918.

In 1965 the Commission stressed that "a maximum diffusion of control of the media of mass communications" is one of the "primary objectives toward which the process of comparison [in licensing] should be directed." *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, 394. This 1965 *Policy Statement,* which directly governed only comparative hearings for new licenses, was applied the same year to comparative renewals. *Seven (7) League Productions, Inc.,* 1 F.C.C. 2d 1597.[3]

In 1968 the Commission proposed rules that would prohibit one person from owning or controlling more than one full-time broadcast station in the same area. *Notice of Proposed Rule Making: Multiple Ownership (Docket 18110)*, 33 Fed. Reg. 5315.[4] The Commission adopted these rules in 1970. *First Report and*

[3] See also *WHDH, Inc.*, 16 F.C.C. 2d 1, 17 F.C.C. 2d 856, affirmed *sub nom. Greater Boston Television Corp.* v. *Federal Communications Commission*, 444 F. 2d 841 (C.A. D.C.), certiorari denied, 403 U.S. 923; *A. H. Belo Broadcasting Corp.*, 47 F.C.C. 2d 540.

[4] The Commission did not propose to end existing combinations; the rule was to be applied only to new station applications, assignments of licenses or transfers of control. *Memorandum Opinion and Order: Multiple Ownership (Docket 18110)*, 12 F.C.C. 2d 912. See also A. 67–69.

Order, 22 F.C.C. 2d 306 (A. 33–100). The Commission stated that "centralization of control over the media of mass communications is, like monopolization of economic power, *per se* undesirable. * * * It is accordingly firmly established that in licensing the use of the radio spectrum for broadcasting, we are to be guided by the sound public policy of placing into many, rather than few hands, the control of this powerful medium of public communication" (A. 41). The Commission continued: "the governing consideration here is power, and power can be realistically tempered on a structural basis. It is therefore no answer to the problem to insist upon a finding of some specific improper conduct or practice. The effects of joint ownership are likely in any event to be so intangible as not to be susceptible of precise definition" (A. 43). The Commission also stated (*ibid.*) that "[a] proper objective is the maximum diversity of ownership that technology permits in each area."

Although the Commission did not then require existing combinations to be dissolved, it set that question for additional consideration (A. 67–69). It reiterated that common ownership of daily newspapers and broadcast stations serving the same area reduced the opportunity for the expression of diverse community viewpoints, and concurrently with its *First Report* commenced a further investigation of that problem in 1970. *Further Notice of Proposed Rulemaking* (*Docket 18110*), 22 F.C.C. 2d 339 (A. 101–

126). The Commission stated that common ownership of co-located newspapers and television stations was a matter of special concern, because "the public looks primarily to these two sources for its news and information on public affairs" (A. 111). It proposed a rule which would effectively limit any person to operation of one television station, one AM–FM radio combination, or one or more newspapers in the same market; persons would have five years in which to comply (A. 116). The Commission predicted that stations would be swapped[5] or sold with favorable tax treatment,[6] and that requiring compliance in five years would cause no more than minimal losses to investors (A. 118–119).

B. THE COMMISSION'S DECISION

In 1975, five years after issuing the notice of proposed rulemaking, the Commission announced its *Second Report and Order,* 50 F.C.C. 2d 1046 (A. 134–316). It prohibited the creation, by initial licens-

[5] The owner of a daily newspaper and broadcast license in city A could comply with the proposed ruling by swapping or exchanging its broadcast license in city A for a broadcast license in city B. For example, petitioner Post Co., licensee of WTOP–TV, Washington, and the *Detroit News*, licensee of WWJ–TV, Detroit recently announced that they would exchange stations. See *Washington Post*, December 7, 1977, p. 1.

[6] The Commission stated that it would certify sales as "necessary" to comply with its rules and thus make any resulting gains eligible for favorable tax treatment under Section 1071 of the Internal Revenue Code of 1954, 26 U.S.C. 1071 (A. 119).

ing or transfer, of new co-located newspaper-broadcast station combinations.[7] Once more the Commission emphasized the "sound public policy of placing into many, rather than a few hands, the control of the broadcast medium" (A. 142).

Noting the maturity of the broadcasting industry and the limited number of existing newspaper and television outlets in most communities, the Commission concluded that "new licensing should be expected to add to local diversity" (A. 191).

The Commission reaffirmed the finding it had made at the start of the rulemaking that broadcast stations, especially television, and daily newspapers are the public's main source of news and public affairs information (A. 208). Moreover, it emphasized that broadcast frequencies are scarce and that daily newspapers are even fewer and decreasing in number (A. 191; see also A. 971–974).[8] It found that 79 television

[7] The Commission decided not to bar the creation of additional AM–FM radio combinations, although it stated that the policy favoring diversity would be considered in individual licensing proceedings (A. 146–153). Although the Commission recognized that there are substantially more radio stations than television stations, it applied the prohibition to newspaper-radio combinations. It emphasized that "we wish to encourage still greater diversity * * * [and that this] is a worthwhile goal which does not depend on its being urgent to be justified" (A. 193).

[8] The number of cities with competing newspapers decreased from 117 in 1945 to 55 in 1973; in 20 of those 55 cities, the competing newspapers have joint operating arrangements. RAND Corporation Study R–1584–NSF, pp. 35–36. In 57 of the 74 cities where there were newspaper-television combinations, there is only one newspaper. In 30 of the 74 Standard Metropolitan Statistical Area ("SMSAs") involved there is only one daily newspaper; in

stations in 74 cities were under common control with daily newspapers published in the same cities (A. 201 n. 29).[9]

The Commission stated that "the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility. If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. * * * [I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination" (A. 200).

Nonetheless, the Commission substantially immunized existing newspaper-broadcast combinations from challenge on diversity grounds and stated that existing combinations would not be disestablished.[10] The

20 other SMSAs there are only two daily newspapers, and in 11 of these, the newspaper that owns a local television station has more than 75 percent of the area's newspaper circulation (computed from RAND Corporation Study R–1585–MF, Table 8 (A. 971–974).

[9] Baltimore, Chicago, Dallas, St. Louis, and Washington, D.C., each had two combinations. RAND Corporation Study R–1585–MF, Table 7 (A. 967–970).

[10] The Commission both declined to adopt a rule requiring dissolution of existing combinations and held that it would not grant a hearing on issues of diversity or competition in individual license proceedings involving petitions to deny license renewal, unless there were allegations of specific abuses or of monopolization (A. 218). It held that in comparative renewal hearings (where another party seeks the license that the incumbent wants renewed), although such issues could be heard, they would not lead to a general restructuring beyond that accomplished in the rulemaking (*ibid.*).

282-906—77——3

Commission concluded that in the case of incumbents (but not for new applicants) the interests of diversity were outweighed by concern for other values. The other values were (A. 196–197): (1) preserving local ownership and owner involvement with management; (2) protecting against "economic dislocation;" and (3) preventing disruption and instability of licensees' service. The Commission stated that "stability and continuity of ownership do serve important public purposes" (A. 197), and that "because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases" (A. 201–202; footnote omitted).

The Commission defined "egregious cases" as those in which only one newspaper and one television station, under common control, served the community."[11] The resulting policy of limited divestiture was, in the Commission's words, one of "minimal diversity" (A. 219)."[12]

[11] There are seven such combinations (A. 242). The Commission also required the separation of nine newspaper-radio combinations in communities with no television stations (*ibid.*).

[12] On petitions for reconsideration, the Commission stressed that the prohibition on cross-ownership would lead to a "gain in terms of diversity * * * [that is] real as well as important" (A. 324). It held, however, that in the case of the incumbent stations, the "important gain in diversity" from separation would be outweighed by "hardship or disruption" (*ibid.*). It did not alter its rules.

C. THE COURT OF APPEALS' DECISION

The court of appeals upheld the Commission's prospective ban on the common ownership of co-located newspapers and broadcast stations (A. 388). It held that the rule neither violated the First Amendment nor exceeded the Commission's statutory authority and was "a rational attempt to promote the highly valued goal of diversity" (*ibid.*). It concluded that "the prospective rules * * * reflect a legislative type policy judgment" (A. 364; footnotes omitted) primarily committed to the Commission's discretion and were neither arbitrary nor capricious (A. 365–374).

The court set aside the Commission's treatment of existing newspaper-broadcast combinations (A. 434). The court recognized that the Commission properly could find that other values outweighed the promotion of diversity, but it concluded that the Commission had not adequately demonstrated why the three competing policies the Commission had invoked outweighed the benefits of diversity (A. 419–427).

The court found that the Commission's concern with preserving local ownership and management was not rationally related to its conclusion. First, Commission precedent had held local ownership to be of little consequence (A. 419). Second, preserving owner involvement with management, though of greater consequence, was not an adequate counterweight because a quarter of the existing co-located stations are not locally owned, and the record contained no evidence

that the rest of the local owners take an active part in station management (A. 419–421). Indeed, the court noted, the Commission had professed a belief that most newspaper-broadcast combinations have separate managements for the newspaper and the broadcast stations (A. 421). Third, by the Commission's own estimate, qualified local residents would be available to buy stations that might be divested (ibid.).

The court found that the Commission's concern with disruption of service was arbitrary in light of the lack of any evidence of service disruption stemming from the Commission's longstanding "practice of routinely approving license assignments" (A. 422–423).[12] Finally, with respect to the Commission's concern that "economic dislocations" might take place because new owners would not have sufficient capital to finance good programming, the court observed that "presumably this would also be the case in voluntary transactions, which the Commission readily permits" (A. 425).

The court, having found that "the Commission could not have rationally concluded the competing policies it offered justified grandfathering" (A. 426),

[12] The court also found merit in the argument of Commissioner Robinson, who would have required divestiture, that holdovers in high-level management often smooth the transition period. "'Indeed, any other action by a new licensee would only reduce the value of his franchise'" (A. 309, quoted at A. 423 n. 100).

remanded the case to the Commission with instructions to apply to all licensees the standards it applied prospectively, subject to appropriate waiver procedures designed to exempt only "those cases where the evidence clearly discloses that cross-ownership is in the public interest" (A. 431, 443).[13] On a motion for stay of mandate, the court stated that the "egregious" co-ownership cases, the existing combinations, and future applicants are "indistinguishable" (A. 443), and that because "the only consistent and court-approved policy in this field" (*ibid.*) is the one expressed in the Commission's prospective rules, the Commission must "take further steps to ensure that everyone [is] consistently treated under the standard already adopted for new license applicants" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 307(a) of the Communications Act of 1934, 48 Stat. 1083, as amended, 47 U.S.C. 307(a), provides that the Federal Communications Commission shall grant an application for a broadcast license "if public convenience, interest, or necessity will be served thereby * * *." For more than 30 years the Commission has taken the position that this standard not only authorizes but also requires it to take into account, in

[13] The court also held that, even if the Commission's decision to leave the existing combinations undisturbed were rational, its refusal to give the same treatment to the combinations in 16 monopoly markets was arbitrary because the Commission failed to show either that there was greater need for divestiture in those markets or that the consequences of divestiture were less harmful (A. 429–431, 441–442).

issuing licenses, the interest of the public in diverse ownership of the media of communications.

The Commission's multiple ownership rules have taken many forms. In *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, the Court dealt with the Commission's rule that any one person may own or have an interest in no more than seven AM stations, seven FM stations, and five VHF television stations. The Court sustained the Commission's rules as properly serving the public interest. 351 U.S. at 202–205. See also *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 363–364.

Another rule, promulgated in 1943, prohibits one person from controlling more than one station in the same broadcast service in the same community. *Order 84–A: Multiple Ownership of Standard Broadcast Stations,* 8 Fed. Reg. 16065. In 1970 the Commission adopted rules prohibiting one person from acquiring control of more than one full-time broadcast station (of any service) in the same community (A. 33–100). And the Commission's policy of achieving "maximum diffusion of control of the media of mass communications" (*Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, 394) has led it over the years in appropriate cases to decline to issue broadcast licenses to persons publishing newspapers in the same community as the broadcast service, where competing applicants were willing and able to operate the broadcast station. *Scripps-Howard Radio* v. *Federal Communications Commission,* 189 F.

2d 677 (C. A. D.C.), certiorari denied, 342 U.S. 830; *Seven (7) League Productions, Inc.,* 1 F.C.C. 2d 1597.

The rules in the present case involve the application of firmly-established principles. The Commission found that it is "sound public policy [to place] into many, rather than a few hands, the control of the broadcast medium" (A. 142) and that "nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible" (A. 200). Much of this seems to be common ground; we do not understand any of the private parties to question the propriety of the Commission's general principles or their application in the other multiple ownership rules. The questions, rather, concern the extent to which the Commission may extend its multiple ownership rules to recognize that newspapers and broadcast stations are part of the same communications market.

I

A. The Commission's decision not to issue new licenses to persons who control newspapers in the same community is not barred by the First Amendment. Its rule neither prohibits nor requires the expression of any views by newspapers or licensees. Newspaper owners do not have a constitutionally protected right to a broadcast license, and denial of a license pursuant to a policy in the public interest does not violate the First Amendment. *National Broadcasting Co., Inc.* v. *United States,* 319 U.S. 190. This Court has recognized that newspapers and broad-

cast stations participate in the same market. United *States* v. *Radio Corp. of America*, 358 U.S. 334, 351–352. Consequently, there is no greater First Amendment objection to a policy designed to deconcentrate ownership of the market than there is to the application of the antitrust laws to the press. This Court has held that the application of the antitrust laws to the press does not violate the First Amendment (*Associated Press* v. *United States*, 326 U.S. 1); to the contrary, because the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" (*id.* at 20), the Commission's rule, like the application of the antitrust laws, advances the interests protected by the First Amendment.

B. The Commission's rule, which is but one aspect of a broader Commission policy designed to allocate finite broadcast licenses in a manner most likely to produce the expression of diverse views, does not discriminate against owners of newspapers. They, like anyone else, may own seven AM stations, seven FM stations, and five VHF television stations. The rule means only that they may not control stations the signals of which overlap the major area of their newspapers' circulation. This limit on the location of stations and newspapers owned by the same persons is not discriminatory. Under the antitrust laws a person who owns one newspaper in a community could not acquire its major competitor; under the

Commission's rules, a person who owns one television station in a community could not acquire another. It is not "discriminatory" in any way to apply the same principle to prevent the formation of new co-located newspaper-broadcast combinations, because both newspapers and broadcast stations are participants in the same communications market.

C. The Commission's rule serves the public interest and therefore is authoried by statute. *Storer Broadcasting* upheld a prohibition on multiple ownership, and the Commission's rule here is not different in any respect material under the Communications Act from the rule upheld in *Storer*.

II

The Commission's rule prohibiting the formation of new co-located newspaper-broadcast combinations is a reasoned and reasonable exercise of its statutory responsibility to promote the public interest. There is no conclusive evidence concerning the benefits and detriments of cross-ownership, but the Commission need not wait for conclusive evidence before acting. After all, it was required either to permit such combinations to be formed in some circumstances or to forbid them; there is no middle ground. The evidence, if unsatisfactory, is unsatisfactory to support either conclusion.

Regulatory agencies necessarily rely on their experience and wisdom in making decisions like the present one. This Court sustained a similar decision in *Storer*, and it should sustain the present decision

as well. The Commission properly reasoned that promotion of diversity is exceptionally important; in the absence of compelling evidence that achievement of other statutory objectives would be hampered by a decision to diversify ownership of the communications media, the Commission's rule is proper.

III

The Commission, having properly decided that the public interest is disserved by co-located newspaper-broadcast combinations, acted arbitrarily in deciding to grandfather all existing combinations, except for those in which the community has only one newspaper and one broadcast station.

We agree with the Commission and its supporters that giving grandfather treatment to existing combinations would be proper if that were justified by an articulable reason reflecting consistent analysis of the public interest by the Commission. But it has not been so justified.

1. The Commission's concern about local ownership and owner-involvement in management is a makeweight. The Commission consistently has concluded that local ownership as such is unimportant, and there is, in any event, no reason to believe that new owners would be less "local" than the present group, one quarter of which are not "local." Although the Commission has ascribed public interest value to owner involvement in licensee management, many, if not most, of the present combination owners are not involved in management of the licensee; they argued in these pro-

ceedings that the broadcast stations and newspapers were operated independently, an argument the Commission repeats here (FCC Br. 23).

2. The Commission's concern about economic dislocation is fanciful. There is no reason to believe that the transfer of existing licenses from present owners to other owners would have any appreciable effect on national, regional, or local economies. And the Commission disavows any concern about preserving the monetary value of individual licenses, because "economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission" (*Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 476).

3. The Commission's concern about continuity of service if divestiture should be ordered is inconsistent with the Commission's settled practice of approving transfers without even holding hearings. Approximately 45 transfers for value occur each year, and the Commission did not state that these were disruptive. It did not cite a single example of disruption. It is most unlikely that a new owner would countenance disruption, and thereby impair the value of the license. Harmful instability would occur only if new licensees behaved irrationally, and the Commission gave no reason to believe that they would do so.

4. Counsel for the Commission offer other justifications for the grandfather clause. These were not adopted by the Commission as a basis for its decision

and so should not be considered here. They are, in any event, inadequate.

One such justification is that newspaper-owned stations give superior service. The Commission did not make such a finding. Indeed, this justification amounts to a contradiction by counsel of the Commission's major premise: that more diversity of ownership is a net gain for the public.

The other justification by counsel is that licensees have legitimate expectations of continuity that are entitled to protection against changes in the Commission's policy. Although we do not doubt that this justification is often adequate to support a statutory grandfather clause (see, *e.g., City of New Orleans* v. *Dukes,* 427 U.S. 297; *United States* v. *Maryland Savings-Share Insurance Corp.,* 400 U.S. 4), it is unavailable to the Commission. Grandfather clauses rest on the *legitimacy* of the expectation of continuity, and Section 301 of the Communications Act of 1934, 48 Stat. 1081, 47 U.S.C. 301, provides that licensees have no legitimate expectation of continuity. Congress has deprived the Commission of the authority to promulgate a grandfather clause on expectancy grounds alone. Because the other grounds proffered by the Commission are inadequate, the grandfather provision of the rule is not rationally supported and was properly set aside.

IV

The court of appeals should not, however, have entered an order effectively requiring divestiture of existing combinations. The court's function ended once

it had exposed the error in the Commission's reasoning. Having done so, the court should have remanded the case to allow the Commission to formulate a new rule based on a reasoned application of the governing legal principles.

ARGUMENT

I

THE COMMISSION HAS THE AUTHORITY TO PROHIBIT CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS

A. THE FIRST AMENDMENT DOES NOT REQUIRE THAT NEWSPAPERS BE ALLOWED TO OWN BROADCAST STATIONS IN THEIR CIRCULATION AREA

Petitioners American Newspaper Publishers Association ("ANPA"), National Association of Broadcasters ("NAB"), and the Post Company ("Post") contend that the First Amendment requires that newspapers be allowed to own broadcast licenses. ANPA Br. 17–26; NAB Br. 25–37; Post Br. 14–16. The gist of their argument is that the government may not impose a burden (inability to own a broadcast station) on someone just because he engages in protected speech as the owner of a newspaper. To deprive newspaper owners of the ability to own broadcast stations, they say, would be to penalize pure speech.

The argument is overstated. The Commissions's rule does not restrict the editorial freedom of either newspapers or broadcasters, and it does not distinguish among newspapers or broadcasters on the basis of the content of their speech.[15] It does not prohibit daily

[15] The case therefore is unlike *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, in which a State instructed a newspaper to publish particular material.

newspapers from owning broadcast stations or stations from acquiring or publishing newspapers; they may do so freely, as long as the major area of the paper's circulation does not overlap the major receiving area of the station. The rule prohibits only common control of a newspaper and a broadcast license that serve the same community.

Suppose that one community has only two newspapers, *A* and *B*. *A* desires to acquire *B* and operate them jointly. The antitrust laws ordinarily would prohibit that acquisition.[16] But the owner of *A* contends that the government may not impose on him a burden (inability to acquire *B*) that would not equally be imposed on a non-newspaper. Thus, the owner of *A* argues, if the owner of an automobile dealership could acquire *B*, then so may he. The argument is identical in form, and in principle, to the First Amendment argument made in this case. This Court already has rejected it in holding that the antitrust laws may be applied to newspapers. "The First Amendment, far from providing an argument against [the] application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *. * * * The First Amendment

[16] Cf. *United States* v. *Greater Buffalo Press, Inc.*, 402 U.S. 549 (acquisition producing concentration in the color supplements market is unlawful).

affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity." *Associated Press* v. *United States*, 326 U.S. 1, 20. See also *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139–140.

If Congress constitutionally may prohibit the owner of one newspaper from acquiring another, then it, and the Commission acting under its authority, constitutionally may prohibit the owner of one newspaper from acquiring a broadcast station, another method of communication that is part of the same communications "market" for rapid dissemination of information. This Court has recognized that newspapers and broadcast stations operate in the same market, and it has stated (albeit in *dictum*) that the Commission might decide that "antitrust considerations alone" would be enough to cause it to deny some applications for broadcast licenses, "as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351–352. See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143.

The rule prohibiting co-located newspaper-broadcast combinations does not chill or control speech. It simply determines who, among many otherwise eligible applicants, shall not be entitled to operate a particular

broadcast station. There are usually more applicants than available frequencies, and there is no constitutional right to be a broadcaster. *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190. In deciding who should be given a license to broadcast, the Commission is entitled to seek to increase the number of different voices in the major media of mass communications. That choice, like the application of the antitrust laws to newspapers, serves the First Amendment because it fosters "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press, supra*, 326 U.S. at 20). See also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756–757.[17]

The Commission has simply applied to applicants controlling newspapers the rule it previously had applied to persons who desired to obtain a second broadcast license in the same market. They may not do so. See, *e.g.*, *1964 Multiple Ownership Rules*, 2 R.R. 2d 1588; *First Report and Order* (A. 33–100). The Commission's new rules treat newspaper owners and broadcast licensees alike. The Commission is entitled to use its authority over the broadcasting spectrum to promote the legitimate goal of diversity of ownership in the mass communications market.[18]

[17] As the Court has observed, "the 'public interest' standard [of the Communications Act] necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 122.

[18] Petitioners' reliance on cases such as *Police Department of Chicago* v. *Mosley*, 408 U.S. 92; *Elrod* v. *Burns*, 427 U.S. 347; and *Speiser* v. *Randall*, 357 U.S. 513, is unwarranted. Those cases, and others like them, involved discrimination against particular kinds of speech or political belief. *Elrod*, for example, involved adverse action against members of one political party in order to give benefits to members of another; *Mosley* was a case of discrimination based on the content of speech. The Commission's rules do not discriminate in this way. All newspapers and all broadcast stations are treated alike.

B. THE COMMISSION'S RULES ARE NOT DISCRIMINATORY

Petitioners ANPA (Br. 27–29) and Post (Br. 16–21) contend that the Commission's rule against co-located newspaper-broadcast combinations violates the equal protection component of the Due Process Clause of the Fifth Amendment. To the extent this argument restates the First Amendment objection to the Commission's rule, it is unpersuasive for the reasons discussed above. To the extent this argument has some broader scope, it is unfounded.

Petitioners' reliance on *Buckley* v. *Valeo*, 424 U.S. 1, also is unsound. *Buckley* held that Congress may not attempt to enhance the relative voice of some speakers by partially silencing others. But no one is silenced by the Commission's rules, and they have not been adopted to enhance the relative strength of speech. Nothing the Commission has done will reduce the number of newspapers and broadcasting stations that engage in speech, or tells any speaker to do less speaking. The Commission must allocate scare channels of communication, and it enhances, rather than impairs, First Amendment values by allocating them in a way that increases the number of different speakers. See *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 388, 390. In *Buckley* Congress attempted to prohibit a person from using his own resources to speak; here, by contrast, no private person owns or has a legitimate claim of entitlement to a broadcast frequency, and the Commission, acting pursuant to law, may consider the public interest in increasing the number and diversity of speakers when allocating those frequencies.

Indeed, it is difficult to identify the discrimination of which petitioners complain. The rule treats all newspapers alike, without regard to their contents. The rule treats newspapers like other media of mass communications; a person cannot acquire a broadcast station in a particular community if he already owns a broadcast station there or if he owns a newspaper there.[19]

Petitioners' argument, then, must be that it is improper for the Commission to treat owners of newspapers the same way as it treats owners of broadcast stations. But because both newspapers and broadcast stations operate in the same market, there is no unfairness in treating them alike.

The rule at issue here is but one manifestation of the Commission's general policy of allocating finite broadcast licenses in the way most likely to produce expression of diverse views by many speakers. See *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 390; cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 112–113 ("[t]he basic principle * * * is 'the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter' "). The Commission's policy is both reasonable and desirable, for the reasons discussed at pages 30–33, *infra.* Nothing in the Constitution prohibits allocation of the broadcast spectrum in a manner designed to promote diversification of the ownership and operation of the media of communications.

[19] The Commission properly decided to proceed by a general proscription rather than by case-by-case evaluation of the need for diversity. Any attempt to analyze case-by-case the performance of a particular broadcaster or newspaper would involve review of the content of broadcasts and newspaper stories and create the unwelcome prospect of content discrimination. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 126.

C. THE COMMUNICATIONS ACT AUTHORIZES THE COMMISSION'S RULES

Petitioners ANPA (Br. 29–46), NAB (Br. 12–25), and Dispatch Printing Co. ("Dispatch") (Br. 6–11) contend that the Commission exceeded its statutory authority by adopting the co-ownership rules. Their "elaborate argument * * * does not need an elaborate answer." *United States* v. *Wurzbach,* 280 U.S. 396, 399.

The Commission has broad power to decide what standards for the issuance of licenses best serve the public interest. *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192.[20] Nothing in the Communications

[20] See *United States* v. *Radio Corp. of America, supra* (Commission may refuse to grant broadcast license to a person owning a newspaper where that would create a communications monopoly). See also *Scripps-Howard Radio* v. *Federal Communications Commission,* 189 F. 2d 677 (C.A. D.C.), certiorari denied, 342 U.S. 830 (in a comparative hearing the Commission may deny an application for a broadcast license on the ground that the applicant owns a newspaper in the same community); *McClatchy Broadcasting Co.* v. *Federal Communications Commission,* 239 F. 2d 15 (C.A. D.C.), certiorari denied, 353 U.S. 918.

Act precludes the Commission from finding that greater diversity of ownership of the media of communications is in the public interest. The Commission for years has barred persons from owning more than one license for the same type of broadcast service in a single community, and petitioners apparently concede that this rule is within the Commission's authority. The propriety of the rule at issue here follows directly, because if the "public interest" is served by diverse ownership of broadcast stations, it is served at least as well by diverse ownership of the media of communications in general. There can be no doubt that the Commission's rule is within its statutory authority, provided that it is sufficiently justified."[21]

Petitioners rely on an opinion by Hampson Gary, the Commission's first general counsel (A. 445–465). Mr. Gary concluded that the Commission may consider newspaper ownership as one public interest factor in deciding whether to issue a broadcast license but may not disqualify newspaper owners as a class from being licensees. The Commission properly pointed out, however, that Mr. Gary's comments concerned only absolute disqualification of newspaper

[21] Petitioner ANPA contends (Br. 29–31) that the Commission's rule is unauthorized because it denies a hearing to a newspaper owner who seeks a broadcast license. But if the Commission may properly deny all applications by newspapers for broadcast licenses within the same community, it necessarily follows that there is no point in holding a hearing, for the outcome would be foreordained. See *United States* v. *Storer Broadcasting Co.*, *supra*, 351 U.S. at 205; *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620–621.

owners, and they do not confront the problem of this case. Because the Commission allows the owner of a newspaper to hold a broadcast license in any community other than the community served by the newspaper, there is no need to consider whether a total disqualification would be proper (A. 144). See also A. 376–378. Moreover, the Commission never formally adopted Mr. Gary's views, and, even if it had, it would be entitled to change its mind. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 169–170.

Petitioners' reliance (ANPA Br. 37–47; NAB Br. 19–20; Dispatch Br. 8–11) on legislative statements made after the enactment of the Communications Act is subject to the same objection as their reliance on Mr. Gary's opinion. Like Mr. Gary's opinion, these statements concern a total prohibition of newspaper ownership of broadcast licenses rather than a limitation on the *location* of licenses that newspaper owners properly may hold. Because the legislative comments were not addressed to limitations on location of licenses, petitioners' "recitation of legislative history is less than persuasive" (A. 378 n. 41).[22]

[22] What is more, petitioners overlook the principle that "statutes are construed by the courts with reference to the circumstances existing at the time of the passage" (*United States* v. *Wise*, 370 U.S. 405, 411), and that subsequent legislative history is not helpful unless it culminates in legislation clearly demonstrating the view of Congress as a whole about the prior statute. Compare *Califano* v. *Sanders*, 430 U.S. 99, with *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 734 n. 14, and *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132.

II

THE RULE PROHIBITING THE CREATION OF NEW CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS IS A REASONED AND REASONABLE EXERCISE BY THE COMMISSION OF ITS MANDATE TO GRANT LICENSES IN THE PUBLIC INTEREST

The Commission thoroughly canvassed the arguments for and against prohibiting co-located newspaper-broadcast combinations (A. 134–146, 153–188). It found, and the court of appeals agreed (A. 395–408), that the attempts to determine whether cross-ownership is quantifiably "harmful" have been largely unsuccessful.[23] A study undertaken by the Commission's staff found that, on the average, newspaper-owned stations performed slightly better than other stations in some respects (A. 198 n. 26, 230–241).[24] Two studies conducted by the RAND Corp. concluded that neither benefit nor detriment of cross-ownership could be established (A. 967–982; notes 8 and 9, *supra*). Another study found numerous examples of detrimental consequences of cross-ownership and criticized the methodology of the RAND studies (A. 990–1051). In light of the difficulty of conducting controlled experiments in broadcasting, it is quite possible that disputes of this sort can never be resolved.

Faced with these conflicting positions, the Commission properly relied primarily on a policy judgment that transcended the evidentiary disputes: because

[23] We do not attempt here to discuss the arguments pro and con. They were comprehensively summarized by the Commission.

[24] But see note 39, *infra*, for a discussion of this study.

there is a policy, rooted in the Constitution itself, favoring "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press* v. *United States, supra,* 326 U.S. at 20), the Commission decided to enhance diversity of ownership of the media of communication in each community (A. 143).

That decision is a proper application of the statutory public interest standard, which necessarily reflects First Amendment values (see note 17, *supra*). Broadcast stations (especially television) and newspapers are the public's primary source of information concerning public affairs (A. 207–208). It is unrealistic to expect true independence of operation of commonly owned stations and newspapers (A. 200),[25] and the Commission therefore concluded that to grant a broadcast license to a person operating a newspaper in the same community would squander an opportunity to increase by one the number of mass media communicators in that community. It is not known, and perhaps never can be known, whether this is a "better" outcome in some absolute sense. But it is

[25] And if, in some cases, commonly owned newspapers and broadcast stations operate absolutely independently, then nothing is lost by a rule requiring ownership as well as editorial policy to be independent. The owner of a newspaper could not complain that the rule deprived him of the opportunity to speak if, in fact, he had insulated himself from the operation of the broadcast station and delegated to someone else the absolute authority to operate the station. In other words, if newspaper and broadcast station already are, or would be, operated independently, no single speaker is using two methods of communication, and the ban on cross-ownership would reduce only his investment opportunities, not his opportunities to speak.

consistent with First Amendment premises to believe that, other things being equal, more diversification of ownership is better than less.

The Commission's conclusion lacks conclusive empirical support, but regulatory agencies necessarily rely on their experience and wisdom in making decisions like the present one. As there is no proof that concentration of ownership harms anyone, so there is no conclusive empirical proof that allowing cross-ownership serves the "public interest" within the meaning of the Communications Act. Yet the Commission was required either to permit co-located newspaper-broadcast combinations or prohibit them; it had no other option. The evidence did not conclusively support either course, and the Commission's choice, being a reasoned and reasonable one and consistent with its statutory authority, should be upheld. See *United States* v. *Storer Broadcasting Co., supra* (upholding the Commission's multiple ownership rules despite the absence of any proof that multiple ownership caused actual harm to the public); cf. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 60–62 (upholding legislative prohibition of pornography despite the absence of conclusive evidence that pornography is harmful).[26]

[26] See also *Whalen* v. *Roe*, 429 U.S. 589, 597, which upholds a state statute requiring the identification of purchasers of certain drugs because the statute "represents a considered attempt" to deal with a problem and is "manifestly the product of an orderly and rational legislative decision." The Court found it immaterial that the necessity for the rule had not been proved, because people must act in even the most important affairs on unprovable assumptions.

ANPA argues (Br. 46–50) that the Commission did not adequately explain why it changed its rules, which previously had allowed the creation of new co-located newspaper-broadcast combinations. But the Commission clearly stated that the economic and technological considerations that influenced its policy choices in the 1940s and 1950s no longer hold sway." At one time the Commission granted broadcast licenses to persons who also owned newspapers because that was an effective way to obtain financially responsible licensees, many of them pioneers of the broadcast medium (A. 188–191, 193–196). But today broadcasting is more mature, and many "qualified and experienced applicants can be expected to step forward" (A. 190) for the available licenses. The Commission's decision that future licensing should be designed to enhance diversity is a considered adaptation of administrative policy to a change in circumstances. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 137–138.

III

THE COMMISSION DID NOT ADEQUATELY JUSTIFY ITS DECISION TO TREAT EXISTING CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS DIFFERENTLY FROM PROPOSALS TO CREATE NEW COMBINATIONS

A. THE COMMISSION HAS ACTED ON THE PREMISE THAT PROMOTION OF DIVERSITY IS AN IMPORTANT ELEMENT OF THE PUBLIC INTEREST

In formulating its prospective rules in this case, the Commission adopted the premise that promotion of

[27] The Commission also properly took into account the consequences of its prior policy in deciding whether that policy should

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diversity in the ownership of the media of communications is one of the most important elements of the public interest the Commission is charged with fulfilling. In so doing, the Commission built on 30 years of precedent. Its earlier decisions, which we have discussed at pages 4–7 and 13–15, *supra*, repeatedly took the course that increased diversity. It limited any person to operation of no more than seven stations of one type in different communities, and no more than one station of any type (except AM–FM combinations) in one community.

The Commission reasoned in the present case not only that it is "sound public policy [to place] into many, rather than a few hands, the control of the broadcast medium" (A. 142) but also that "the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility * * * [and] nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible" (A. 200).

This language may be, as the Commission now contends (FCC Br. 35), nothing more than hyperbole. The court of appeals recognized as much (A. 418). But this hyperbole is the basis of a great deal of the Commission's policy, including the prospective rules at issue in this case. It represents a conclusion of fundamental importance for the Commission's operations. Although some things may be more important than diversity in particular cases, the Commission has the

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be altered. The Commission pointed out, for example, that its policy had led to substantial concentration of media ownership (A. 161–165).

responsibility to demonstrate what these things are, and why they are more important.

The Commission's rules contain a grandfather clause that insulates incumbent licensees from challenge on diversity grounds, both in rulemaking and in future license renewal proceedings (A. 218). The decision by the Commission to compromise one of its most fundamental principles and to settle for a policy of "minimal diversity" (A. 219) [28] must be scrutinized under a standard of review that is familiar. An agency's policy choices may not be arbitrary, and its decisions may not be internally inconsistent.[29] The Commission had a responsibility to explain why it departed from its own principles in reaching the decision to include a grandfather provision in its rules. We turn to an analysis of that decision.

[28] The Commission stated that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination" (A. 200, 323 n. 9). If this premise is correct, then the grandfather provision of the rules sacrifices significant opportunities for diversity. A general disestablishment of co-located newspaper-broadcast combinations would have increased the number of independent major media outlets (newspapers and television station combined) by at least 20 percent in 68 of the 74 cities, and in 55 of the 74 Standard Metropolitan Statistical Areas, that had cross-ownership when it issued the *Second Report and Order*. A. 971–978 (computed from Tables 8 and 9 of RAND Corporation Study R–1585–MF).

[29] See 5 U.S.C. 706; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284–286; *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806–808; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416.

B. THE INTERESTS ON WHICH THE COMMISSION RELIED TO SUPPORT ITS GRANDFATHERING DECISION APPEAR INSUBSTANTIAL FOR THAT PURPOSE, AND THE COMMISSION DID NOT ADEQUATELY EXPLAIN WHY THOSE INTERESTS OUTWEIGH THE VALUE OF DIVERSE MEDIA OWNERSHIP

The Commission concluded that disestablishing existing co-located newspaper-broadcast combinations would be more harmful than helpful. Although the value of diverse ownership is the same whether diversity is brought about in new licensing proceedings or by separating existing combinations, the Commission explained that separation would cause harm to three other values that it believes are important. These competing values, the Commission stated, are (A. 196):

1. Preserving local ownership and owner involvement with management
2. Avoiding economic dislocation
3. Preventing disruption and instability of licensees' service

The Commission summarized its position by stating (A. 197) that "stability and continuity of ownership do serve important public purposes." The rule it adopted demonstrates that, in the Commission's view, "stability and continuity of ownership" are more important than the benefits of diversity.

The court of appeals stated (A. 418), and we agree, that the Commission properly may conclude that other interests are more important than diversity and call for less than complete diversity. But the Commission must reach such a conclusion in a reasoned way, and we submit that its rationale fails on its own terms.

1. Preserving local ownership and owner involvement with management

The Commission expressed concern that an order separating existing co-located newspaper-broadcast combinations would undermine local ownership of broadcast stations and erode the role of owners in management, two values that the Commission has sought to foster in the past. The Commission now seems to have retreated from this justification,[30] and properly so.

As the court of appeals observed (A. 419), the Commission consistently has concluded that local ownership is not in itself a significant objective in broadcast licensing. The Commission did not purport to change its mind on this subject, and its expression of concern about local ownership (A. 197) therefore seems to be a makeweight.[31]

The Commission has, by contrast, given significant weight to owner involvement with management. The

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[30] The Commission confines its discussion of this justification to a single footnote (FCC Br. 38 n. 63). Other petitioners supporting the Commission's grandfather provisions concede that this rationale is of "peripheral importance" (Channel Two Br. 49). ["FCC Br." refers to the Commission's brief as petitioner in No 76-1461.]

[31] Indeed, the Commission admits (FCC Br. 26) that one quarter of all co-located newspaper-broadcast operations are not "locally" owned. Consequently, even if the objective of encouraging local ownership were entitled to weight, it would not justify the creation of a grandfather provision for these licensees. It would not, moreover, justify allowing the renewal of "local" cross-ownership against a competing application by another qualified "local" party.

invocation of that objective here, however, would be difficult to sustain, because the Commission lacked evidence that new owners would be less likely than the present owners to be involved in the management of the broadcast stations.

First, as the Commission recognized (A. 161) and the court of appeals emphasized (A. 421), most if not all of the persons who own newspapers are *not* involved in the management of their co-located broadcast stations.[32] If this is so, then grandfathering in the interest of preserving non-existent owner-involvement in station management would be irrational. If, on the other hand, the newspaper owners actively manage their broadcast stations, the Commission's failure to order more extensive divestiture is inconsistent, for the Commission stated that owner-involvement would involve "an important point" about which it "would have to be concerned" and that if newspaper owners were actively involved in managing broadcast stations "it might have been necessary for the Commission to act to require divestiture in many more situations * * *" (A. 219). The Commission (and the owners) cannot have it both ways.

Second, the Commission overlooked the likelihood—given the fact that most persons who own both newspapers and broadcast stations are not now involved in management of the broadcast station—that dissolution of the combinations could lead to a substantial

[32] See also Channel Two Br. 12; FCC Br. 23 ("the record indicated that most commonly owned newspapers and broadcast stations were operated separately").

increase in the amount of involvement of (the new) owners in station management. Broadcast stations are an attractive investment, and "qualified and experienced applicants can be expected to step forward" (A. 190) if licenses should become available. In sum, the Commission has failed to offer any reason to believe that the disestablishment of present combinations would lead to a diminution of either local ownership or owner involvement in management.[33]

2. Avoiding economic dislocation

The Commission expressed concern that "local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too" (A. 197). This reasoning is, as the court of appeals remarked, "not entirely clear" (A. 424).

The Commission's concern about "economic dislocations" may amount to a forecast that divestiture would affect interest rates, but the Commission has no economic expertise in that field and did not purport to rely on any economic forecasts or studies of the effects on the economy of disestablishment of

[33] The Commission's argument (FCC Br. 38 n. 83) that it "was not unreasonable" for the Commission to "take [into] account" these considerations misses the point: in the absence of evidence to support the Commission's concerns, and in light of the fact that the Commission has not previously given local ownership weight, it was arbitrary to allow these considerations to serve as counterweights to the acknowledged, important benefits of diversity.

co-ownership. In any event, it strains credulity to assert that the transfer of several hundred million dollars of existing assets from one group of investors to another would have any discernible effect on the national economy.[34]

The Commission might have been referring, instead, to the possibility that subjecting broadcast licenses to a forced sale (or transfer) would decrease the value of the licenses and hence reduce the price they otherwise could bring for their owners.[35] But if the Commission was concerned about the potential financial loss to investors, it overlooked the principle that "economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or [deny] a license." *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 476. "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *Id.* at 475; see also *Ashbacker Radio Co.*

[34] The gross national product of the United States in 1976 exceeded $1.6 trillion (Economic Report of the President, January 1977, Appendix B, Table B–1, p. 187). We have been informed by the Federal Reserve Board that the aggregate amount of capital newly invested during 1976 in all forms of debt and equity was approximately $300 billion. The aggregate amount of existing capital traded or sold (say, on a stock exchange) is many times greater.

[35] Counsel for the Commission have not attempted to support the Commission's decision on this reasoning. In the court of appeals, the Commission's counsel explicitly disclaimed (Br. 34–39) any intent on the part of the Commission to spare licensees from economic loss.

v. *Federal Communications Commission,* 326 U.S. 327, 331–332. What is more, such a concern would be inconsistent with the Commission's conclusion, stated earlier in its opinion, that separation would not cause loss to the station owners (A. 118–119), and the Commission furnished no reason to doubt the accuracy of that estimate.[36]

Counsel for the Commission argued in the court of appeals (see A. 425), as they do here (FCC Br. 38 n. 84), that divestiture "might have an adverse economic impact ultimately affecting the quality of program service." Counsel refer to A. 177–178, where the Commission summarized the argument "made by several broadcast interests" that new owners would be required to pay high prices for the broadcast licenses and hence would lack the resources to provide quality programming. But the Commission did not accept this argument, and the arguments of counsel are not a substitute for reasoned administrative decisionmaking. *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 92–95; *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168–169.

In any event, this explanation falls short of supporting the Commission's decision, because it does not explain why new owners are any more likely than

[36] Another portion of the Commission's opinion anticipated that the licensees would realize gain on the transfer or sale of their licenses (A. 211 n. 45). It may be that the Commission was concerned that a requirement of separation would diminish the amount of gain in particular cases, but for the reasons stated in this text this is not a legitimate consideration.

present owners to be short of investment capital or operating funds. If the returns generated by a station are sufficiently high to justify a handsome selling price, the licensee (present or future) would be unlikely to jeopardize his return by allowing deterioration of programming quality. Quality programming may be expensive, but unless it yields a return or is required by regulations neither the present owner nor any future owner would be willing to provide it. There is simply no reason to believe that present licensees are more willing or able as a class than potential future licensees to provide the funds necessary to support quality programming.

This economic reality is reflected in the Commission's own practices. The Commission routinely approves voluntary transfers of licenses, often for large sums of money. During the six years before its decision in the present case, the Commission granted, without holding a hearing, approximately 270 transfers or assignments for value of commercial television licenses (A. 423 n. 99).[37] In none of these cases did the Commission express concern that the new owner would be unable or unwilling to support quality programming, and there is no evidence that programming quality subsequently deteriorated as a result of high transfer prices. There is no greater reason for such

[37] The Commission approved 678 license assignments during those six years without a hearing. Although, as the Commission argued in the court of appeals, many of the transfers were *pro forma* (for example, transfers, on the death of the licensee, to his or her heirs), the Commission admitted that approximately 40 percent of the transfers were for value to new owners.

concern here than there was in any of those license transfers.

3. Continuity of service

The Commission stated that divestiture would jeopardize "continuity of operation * * * as the new owner would lack the long knowledge of the community and would have to begin raw" (A. 197). This statement is ambiguous.

To the extent the Commission was concerned about "knowledge of the community," its statement repeats the concern about local ownership, and it is insubstantial for the reasons we have discussed above. To the extent the Commission meant that transfer of a license is inevitably (or even sometimes) an unwelcome disruption, its concern is inconsistent with its practice of routinely approving applications for transfer. The Commission did not cite a single instance in which a transfer of a license has caused disruption or lack of necessary continuity and, so far as we are aware, could not have cited one. The Commission approved without a hearing the transfer for value of approximately 270 licenses between 1969 and 1975; it seems most unlikely that the transfer over a five-year period of at most 79 television stations owned by persons who own newspapers in the same communities would cause significant adverse consequences if the prior transfers have caused none. Indeed, the Commission did not alter its policy of allowing transfers with only the most cursory attention; this decision to continue processing transfers as before appears to

reflect a recognition that there is no harm in the process.[38]

Commissioner Robinson stated in a separate opinion (A. 309) that new licensees would likely retain the station's personnel for some time to smooth the process of transition, and that "any other action by the new licensee would only reduce the value of his franchise." The Commission did not respond to this observation, which seems unanswerable. There is no reason why new licensees would "begin raw" in any case in which continuity were desirable; attributing to new licensees a willingness to permit (or cause) harmful disruption in service is attributing irrationality, and the Commission has not offered any reason to believe that owners (present or potential) disserve their own interests.

[38] The Commission and its supporters refer to the Commission's policy against trafficking in broadcast licenses. FCC Br. 24; Channel Two Br. 46–47. The Commission, concerned about the large number of substantial transfer applications made during a licensee's first term, adopted rules that require a hearing on most applications to transfer a license during that time. *Applications for Voluntary Assignments or Transfers of Control*, 25 Fed. Reg. 12898 (1960); *Procedures on Transfer and Assignment Applications*, 32 F.C.C. 689 (1962). The rules do not apply to transfers after three years. *Procedures*, *supra*, 32 F.C.C. at 691–692. The Commission explained that when a substantial transfer occurs after three years of operations, the problems of trafficking and disruption are so likely to be insubstantial that there is no need for even a hearing on those questions. *Id.* at 691–692. The antitrafficking rules therefore do not support the Commission here; to the contrary, the rationale for not holding a hearing on any transfer after three years of ownership undermines the Commission's arguments.

4. Other justifications

Our discussion to this point has addressed all of the justifications that the Commission offered for the grandfather clause of its proposed rule. In this Court the Commission's attorneys offer additional arguments. These should not be considered, because the Commission's opinion, not the arguments of its attorneys, is the subject of judicial review. *Securities and Exchange Commission* v. *Chenery Corp., supra; Burlington Truck Lines* v. *United States, supra.* We nevertheless briefly consider the arguments of counsel.

The Commission's brief states that newspaper-owned stations have "established traditions of service" (Br. 24) and that a "careful study by the Commission's staff * * * even showed some superiority [of newspaper-owned] * * * to other stations" (*ibid.*). It argues that "[d]ivestiture introduce[s] the danger of disrupting this proven, superior service—to the detriment of the public interest" (*ibid.*). One may legitimately wonder why, if newspaper-owned stations give "superior" service, the Commission decided not to allow additional combinations. The answer is that the Commission did not find any superiority of service, and the Commission's major premise was that greater diversity would be preferable.[39] Counsel may not

[39] The Commission referred in passing (A. 198 n. 26) to a staff study that, the Commission stated, showed "an undramatic but nonetheless statistically significant superiority in newspaper owned television stations in a number of program particulars." This study, which is reproduced at A. 230–241, did not show gen-

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attempt to contradict this rationale by positing that newspaper-owned stations provide "superior" service.

Several petitioners (*e.g.*, Channel Two Br. 35, 45) and counsel for the Commission (FCC Br. 27–29) contend that the very fact of incumbency gives a licensee an interest in retaining his license, and that this interest is more important than the potential

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eral superiority of newspaper-owned stations; it showed only that newspaper-owned stations on the average are slightly better in some respects than other stations on the average. It did not rule out the possibility (even the likelihood) that many newspaper-owned stations are inferior to the average. The Commission's grandfather clause, however, covers all stations, the superior and the inferior alike.

Moreover, the Commission did not adopt or endorse the findings of its staff report. It could not properly have done so. The report was not made available to the parties for comment in advance of the Commission's decision, and a "journey outside the record" to rely on the study would itself have been a ground to set aside the Commission's order. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 528. We do not contend that all reference to extra-record information is improper, but the staff study here was a unique document that deserved scrutiny before being adopted. Its conclusions are quite different from those of studies that were in the record (see A. 990–1051) and were subject to methodological criticism. For example, most of the variables in its analysis were "dummy" variables that may be influenced by common factors; the study did not attempt to exclude "multicollinearity" of this sort; because the authors of the study did not ensure true independence of the "independent" variables, the results are not reliable. We believe that Commissioner Robinson accurately analyzed the state of the evidence in writing (A. 293): "similar studies by a leading economic scholar of communications (which have not been effectively rebutted) indicate no significant difference in news or public affairs programming, and no significant difference in the character or diversity of other program types."

gains of increased diversity. The Commission's brief speaks, for example, of the "inherent hardship, quite apart from any question of financial gain or loss" (Br. 27), that accompanies divestiture. The Commission argues that the expectancy interest a licensee acquires in holding that license is a solid reason for a grandfather provision in the cross-ownership rules.

We do not doubt that Congress could decide that the legitimate expectations of persons in retaining broadcast licenses—or in continuing to carry out any other endeavor—are by themselves adequate to justify exemption from changes in governing legal rules. The Court held in *City of New Orleans* v. *Dukes*, 427 U.S. 297, that protection of legitimate expectations is a rational basis on which to draw legislative distinctions. Grandfather clauses are routinely employed by legislatures and by administrative agencies to protect legitimate expectations, and their employment is a reasonable means of implementing policy changes. See, *e.g.*, *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4; *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554."

But Congress has specifically denied to broadcast licensees the sort of interest that would make grand-

" Grandfather clauses may be constitutionally required when legislation could not properly operate retrospectively. Compare *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (retrospective application usually is within legislative power), with *Berger* v. *Board of Psychologist Examiners*, 521 F. 2d 1056 (C.A. D.C.) (grandfather clause necessary to save statute from due process challenge).

father treatment by the Commission automatically reasonable. A license to broadcast typically runs for three years, and "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." Section 301 of the Communications Act of 1934, 48 Stat. 1081, 47 U.S.C. 301. The recipient of a license must waive "any claim to the use of any particular frequency * * * because of the previous use of the same * * *." Section 304, 48 Stat. 1083, 47 U.S.C. 304. Prior to the Communications Act there was no legitimate expectation of continuity (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 282), and the statute makes it impossible for new interests to arise. *Federal Communications Commission* v. *Sanders Brothers Radio Station, supra; Ashbacker Radio Co.* v. *Federal Communications Commission, supra.*

Because there is no legitimate expectancy interest beyond the term of the license, the Commission turns instead to an argument that a licensee has a legitimate expectation of renewal of the license if he performs satisfactorily (FCC Br. 27). To some extent this is a bootstrap argument—an attempt to manufacture the legitimate expectation that Congress so clearly withheld.

We agree with the Commission, however, that a license ordinarily should be renewed if the licensee's performance is superior: "*superior* performance should be a plus of major significance in renewal proceedings" (*Citizens Communications Center* v. *Federal Communications Commission*, 447 F. 2d 1201, 1213 and n. 35 (C.A. D.C.)(emphasis in original)).[41] See also *Greater Boston Television Corp.* v. *Federal Communications Commission,* 444 F. 2d 841, 854 (C.A. D.C.), certiorari denied, 402 U.S. 923. Licensees often must make substantial investments of time and money in order to achieve superior performance; they would be less likely to make such investments if, every three years, they were required to start from scratch in attempting to retain their licenses.[42] The Commission's policy of giving great weight to superior performance as a reason to renew a license thus makes it possible for prudent men to dedicate their lives and their assets to broadcasting; without such an expectation broadcasting could not hope for excellence.

But the premise of the Commission's grandfather clause was not that newspaper-owned stations give generally superior performance; the prospective rule

[41] The court also stated that "[i]nsubstantial past performance should preclude renewal of a license. The licensee, having been given the chance and having failed, should be through." 447 F. 2d at 1213. The Commission apparently agrees with this principle, because it speaks of renewal expectancies only for licensees that have "given good service" (FCC Br. 27).

[42] The value of a broadcast station often significantly exceeds the value of its tangible assets. The difference represents the capitalized earnings stream of the station, some of which is attributable to the value of the license itself and some of which is attributable to "goodwill," or listener loyalty, built up through prudent and successful operation of the station. The value of the latter investment is irrevocably lost if a license is not renewed; the owner in that circumstance can sell only the tangible assets of the station.

against additional co-located newspaper-broadcast combinations rests on the premise that additional diversity would be valuable. The Commission did not limit its grandfather clause to newspaper-owned stations that have given truly superior service; the rule applies to all, without any attempt to differentiate with respect to quality of service. The Commission did not rely on the need to protect investors against catastrophic loss in order to attract good managers and needed capital into broadcasting; a rule requiring divestiture does not impose the large loss that would result from denial of renewal. A licensee could recoup its investment by selling the license to a third party (or by swapping with the owner of a newspaper in another community).

The specter of loss would be present only if the Commission were to cancel the outstanding licenses; divestiture, however, involves sales and transfers, not cancellations. The Commission contemplated that licensees would be able to sell or exchange their licenses without significant loss (A. 118–119, 211 n. 45). The rationale for recognizing a legitimate expectancy interest in the renewal of licenses has little bearing, then, on the present problem, for the licenses would be renewed and simply transferred to other persons who, on the Commission's own reasoning, are likely to improve the diversity, and thus the quality, of broadcast service as a whole.[43]

[43] The Commission itself has declined to employ grandfather clauses where there was no need to do so. See, *e.g.*, *United States* v. *Midest Video Corp.*, 406 U.S. 649, 673–674 n. 31 (plurality opinion) (approving the Commission's refusal to recognize grandfather

The Commission's decision may be upheld only if there is a satisfactory reason to believe that a grandfather clause is in the public interest. For the reasons we have discussed at pages 36–44, *supra*, the reasons offered by the Commission are insubstantial, in light of unrepudiated, established Commission policies and practices, and the court of appeals therefore properly set the Commission's decision aside."

rights in cable television); *Section 214 Certificates*, 21 F.C.C. 2d 307, affirmed *sub nom. General Telephone Co. of Southwest* v. *United States*, 459 F. 2d 846 (C.A. 5); *Order 84–A: Multiple Ownership of Standard Broadcast Stations*, 8 Fed. Reg. 16065.

" We submit, however, that the court of appeals erred in holding that the Commission's divestiture requirement directed to combinations that constituted a monopoly in their communities was arbitrary (A. 429–431, 441–442). The court properly noted that divestiture poses no greater danger to the public interest in the grandfathered markets than in monopoly markets (A. 429). That, however, is only half of the public interest balance. The Commission's determination that the need for diversity in a monopoly market is especially great is unquestionably rational as a matter of policy. See *United States* v. *Radio Corp. of America*, *supra*, 358 U.S. at 351–352. The court's belief that "[d]ivestiture * * * may be more useful in the larger markets" than in the monopoly markets (A. 430) is an improper substitution of the court's judgment for that of the Commission. Consequently, although the court of appeals' invalidation of this aspect of the Commission's rules would be unimportant if this Court should hold (as the court of appeals did) that the Commission must order separation of *all* existing combinations (that do not individually qualify for a waiver), the court of appeals' decision in this respect should be set aside if, as we argue at page 52, *infra*, the case should be remanded for further consideration by the Commission rather than for the automatic entry of divestiture orders. Reversal of this portion of the court of appeals' judgment will permit divestiture to proceed in the monopoly markets while the Commission is reconsidering its position with respect to the other existing combinations.

IV

THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO ALLOW THE COMMISSION TO RECONSIDER ITS DECISION IN LIGHT OF THE PROPER LEGAL STANDARDS

Although the court of appeals correctly held that the Commission's decision to insulate the existing combinations from challenge on diversity grounds was not rational agency action, we agree with the Commission (FCC Br. 42) that the court should not have directed the Commission to adopt a rule requiring the separation of all combinations.

Except in extraordinary situations, "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. Accord, *National Labor Relations Board* v. *Food Store Employees*, 417 U.S. 1, 9; *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 806. The court of appeals did not find that any extraordinary circumstances counseled against that course here. Consequently, after properly identifying the flaws in the Commission's reasoning, the court of appeals should have returned the case to the Commission, leaving the agency free to formulate a new rule of its choosing based on a reasoned application of the governing legal principles.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it upholds the Commission's decision with respect to the creation of new combinations and declares that the Commission's determination not to require divestiture of most existing combinations constituted arbitrary and improper decision making. The judgment should be reversed insofar as it sets aside the Commission's requirement that monopoly combinations be divested and the case remanded with instructions to enforce that part of the Commission's order. The remainder of the court of appeals' judgment should be vacated and the case should be remanded with instructions that it be returned to the Commission for further proceedings.

Respectfully submitted.

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OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE

FILED ON BEHALF OF DISPATCH PRINTING COMPANY AND THE JOURNAL COMPANY

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Congress Has Made It Clear That It Has Delegated No Power To The Commission To Make A General Rule Denying Broadcast Licenses To Newspaper Owners 6

II. Determinations Of "Public Convenience, Interest, And Necessity" Have Been Delegated By Congress To The Commission And Not To The Courts, And The Court Below, By Itself Making Such A Determination, Exceeded The Proper Scope Of Judicial Review 11

A. The Intent, As Well As The Effect Of The Decision Of The Court Below, Was To Usurp The Commission's Responsibility To Determine The Public Interest 12

B. The Usurpation By The Court Below Of The Commission's Responsibility Was Improper 17

1. The Court Below Improperly Undertook To Weigh The Evidence 19

2. A Court May Not Conclude That An Agency Decision Is Invalid Merely Because It Would Weigh The Factors Involved In That Decision Differently Than The Agency 20

3. The Court Below Exceeded The Proper Scope Of Judicial Review By Commanding The Commission To Adopt A Specific Rule Selected By It 26

C. The Court Below Trespassed On The Principle Of Separation Of Powers 28

Page

III. The Court Of Appeals Erred In Concluding That The Commission's Determination That Its New Rule Should Not Generally Be Applied Retroactively Was Irrational 32

A. Rationality Does Not Require Retroactivity . 32

B. Retroactivity Has Not Been Required For The Validity Of Rulemaking, Legislation Or Judicial Action 35

1. Prospective-only Commission Rules 36

2. Prospective-only By Other Agencies 37

3. Prospective-only Legislation 38

4. Prospective-only Holdings By This Court And Other Courts 39

CONCLUSION 44

TABLE OF AUTHORITIES

CASES:

Action for Children's Television v. *FCC*, Case No. 74-2006 (D.C. Cir., July 1, 1977) 39
Adams v. *Illinois*, 405 U.S. 278 (1972) 42
Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944) 33
Allen v. *State Bd. of Elections*, 393 U.S. 544 (1969) 40
Almeida-Sanchez v. *United States*, 413 U.S. 266 (1973) 42
American Airlines, Inc. v. *CAB*, 192 F.2d 417 (D.C. Cir. 1951) 20
American Telephone & Telegraph Co. v. *United States*, 299 U.S. 232 (1936) 30
Associated Industries of New York State, Inc. v. *Dept. of Labor*, 487 F.2d 342 (2d Cir. 1973) 21
Associated Press v. *United States*, 326 U.S. 1 (1945) .. 16
Balts v. *Balts*, 273 Minn. 419, 142 N.W. 2d 66 (1966) .. 39
Board of Trade v. *United States*, 314 U.S. 534 (1942) .. 30
Bowen v. *United States*, 422 U.S. 916 (1975) 42
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) 21
Brandywine-Main Line Radio, Inc. v. *FCC*, 473 F.2d 16, (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) . 16

Page

Buckeye Cablevision, Inc. v. *FCC*, 387 F.2d 220 (D.C. Cir. 1967) 37
Burns v. *Owens*, 459 S.W. 2d 303 (Mo. 1970) 38
Calder v. *Bull*, 3 Dall. 386 (1798) 35
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 40, 42, 43
Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371 (1940) 40
Chimel v. *California*, 395 U.S. 752 (1969) 41
Cipriano v. *City of Houma*, 395 U.S. 701 (1969) 39, 43
Citizens Communications Center v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971) 23
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 18, 21
City of Phoenix v. *Kolodziejski*, 399 U.S. 204 (1970) .. 40
Claridge Apartments Co. v. *Comm'r*, 323 U.S. 141 (1944) 35
Coleman v. *Alabama*, 399 U.S. 1 (1970) 42
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1972) 14. 23, 26
Columbus Broadcasting Coalition v. *FCC*, 505 F.2d 320 (D.C. Cir. 1974) 38
Committee for Open Media v. *FCC*, 533 F.2d 1 (D.C. Cir. 1976) 37
Connecticut Committee Against Pay TV v. *FCC*, 301 F.2d 835 (D.C. Cir. 1962) 20
Cornell v. *United States*, 427 F.2d 680 (2d Cir. 1970) .. 30
Daniel v. *Louisiana*, 420 U.S. 31 (1975) 42
Dawson v. *Olsen*, 94 Idaho 636, 496 P.2d 97 (1972) 38
Desist v. *United States*, 394 U.S. 244 (1969) 41
England v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) 40
Escobedo v. *Illinois*, 378 U.S. 478 (1964) 41
Ethyl Corp. v. *EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) 21
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 12, 27, 28, 31
FCC v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) 24, 26, 31
FCC v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940) 23
FCC v. *Schreiber*, 381 U.S. 279 (1965) 30
FCC v. *WOKO, Inc.*, 329 U.S. 223 (1946) 26

Page

Federal Radio Commission v. *General Electric Co.*, 281 U.S. 464 (1930) 29, 30
Fidelity Television, Inc. v. *FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975) 23
Fountain v. *Fountain*, 214 Va. 347, 200 S.E.2d 513 (1973), *cert. denied*, 416 U.S. 939, *rehearing denied*, 417 U.S. 927 (1974) 39
FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) ..27, 28, 29, 31
General Telephone Company of the Southwest v. *United States*, 449 F.2d 846 (5th Cir. 1971) 33
Gilbert v. *California*, 388 U.S. 263 (1967) 41
Goller v. *White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963) 39
Gosa v. *Mayden*, 413 U.S. 665 (1973) 42
Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) 38
Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied sub nom. WHDH, Inc.* v. *FCC*, 403 U.S. 923 (1971) 23
Griffin v. *California*, 380 U.S. 609 (1965) 41
Grosso v. *United States*, 390 U.S. 62 (1968) 42
Halliday v. *United States*, 394 U.S. 831 (1969) 41
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 40
Hassett v. *Welch*, 303 U.S. 303 (1938) 35
James v. *United States*, 366 U.S. 213 (1961) 41
Jefferson Standard Broadcasting Co. v. *FCC*, 297 F. Supp. 784 (W.D.N.C. 1969) 37
Jenkins v. *Delaware*, 395 U.S. 213 (1969) 41
Johnson v. *New Jersey*, 384 U.S. 719 (1966) 41
Katz v. *United States*, 389 U.S. 347 (1967) 41
Kojis v. *Doctors Hospital*, 12 Wis.2d 367, 107 N.W. 2d 131, *modified on rehearing*, 107 N.W. 2d 193 (1963) 39
Langdell v. *Dodge*, 100 N.H. 118, 122 A.2d 529 (1956) .. 39
Lemon v. *Kurtzman*, 411 U.S. 192 (1973) 40
Linkletter v. *Walker*, 381 U.S. 618 (1965) 41, 43
Maceren v. *District Director, Immigration and Naturalization Service*, 509 F.2d 934 (9th Cir. 1974) 37
Mackey v. *United States*, 401 U.S. 667 (1971) 41
Marchetti v. *United States*, 390 U.S. 39 (1968) 42
Mapp v. *Ohio*, 367 U.S. 643 (1961) 41
Marks v. *United States*, 430 U.S. 188 (1977) 42
McClatchy Broadcasting Co. v. *FCC*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) 24

Page

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 23
Michigan v. *Payne*, 412 U.S. 47 (1973) 42
Michigan v. *Tucker*, 417 U.S. 433 (1974) 41
Miller v. *California*, 413 U.S. 15 (1973) 42
Miranda v. *Arizona*, 384 U.S. 436 (1966) 41
Molitor v. *Kaneland Community Unit Dist., No. 302*, 18 Ill.2d 11, 163 N.E. 2d 89 (1959) 38
Mt. Mansfield Television, Inc. v. *FCC*, 442 F.2d 470 (2d Cir. 1970) 19, 20
National Ass'n of Independent Television Producers and Distributors v. *FCC*, 516 F.2d 526 (2d Cir. 1975) 26, 31
National Ass'n of Motor Bus Owners v. *FCC*, 460 F.2d 561 (2d Cir. 1972) 31
National Broadcasting Co. v. *FCC*, 516 F.2d 1101 (D.C. Cir. 1975), *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co.*, 424 U.S. 910 (1976) 28
National Broadcasting Co., Inc. v. *United States*, 319 U.S. 190 (1943) 18, 21, 22, 25, 30, 36
Niagara Mohawk Power Corp. v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967) 33
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 38
NLRB v. *E&B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960) 37
NLRB v. *Food Store Employees Union*, 417 U.S. 1 (1974) 28
NLRB v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) 37, 38
NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) 38
North Carolina v. *Pearce*, 395 U.S. 711 (1969) 42
O'Callahan v. *Parker*, 395 U.S. 258 (1969) 42
Parker v. *Port Huron Hospital*, 361 Mich. 1, 105 N.W. 2d 1 (1960) 39
Public Interest Research Group v. *FCC*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) ..25, 26
Radio Corp. of America v. *United States*, 341 U.S. 412 (1951) 30
Radio Relay Corp. v. *FCC*, 409 F.2d 322 (2d Cir. 1969) 26, 30
Red Lion Broadcasting Co., Inc. v. *FCC*, 395 U.S. 367 (1969) 14, 16, 18, 24

Page

Retail, Wholesale and Dep't Store Union v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972) 33, 37
Schwartz v. *U.S. Rubber Corp.*, 112 N.J. Super. 595, 272 A.2d 310 (1971) 39
Scripps-Howard Radio, Inc. v. *FCC*, 316 U.S. 4 (1942) . 32
SEC v. *Chenery Corp.*, 332 U.S. 194 (1946) 25, 32, 33, 34
Simpson v. *Union Oil Co.*, 377 U.S. 13 (1964) 40
South Prairie Construction Co. v. *Local 627, Operating Engineers*, 427 U.S. 800 (1976) 28
Stovall v. *Denno*, 388 U.S. 293 (1967) 41
Taylor v. *Louisiana*. 419 U.S. 522 (1975) 42
Tehan v. *United States ex rel. Shott*, 382 U.S. 406 (1966) 41
The Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 25
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) 19
United States v. *Estate of Donnelly*, 397 U.S. 286 (1970) 40
United States v. *Maher*, 307 U.S. 148 (1939) 34, 35
United States v. *McDaniel*, 7 Peters 1 (1833) 33
United States v. *Morgan*, 313 U.S. 409 (1941) 32
United States v. *Peltier*, 422 U.S. 531 (1975) 42
United States v. *Saskatchewan Minerals*, 385 U.S. 94 (1966) 31
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 37
United States v. *Wade*, 388 U.S. 218 (1967) 41
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, No. 76-419, to be argued November 28, 1977, reviewing *Natural Resources Defense Council, Inc.* v. *Nuclear Regulatory Commission*, 547 F.2d 633 (D.C. Cir. 1976) ... 26
Vickers v. *Vickers*, 109 N.H. 169, 242 A.2d 57 (1968)... 39
Williams v. *United States*, 401 U.S. 646 (1971) 41

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const. Art. I, § 9, cl. 3 35
U.S. Const. Amend. I 7, 15, 25
U.S. Const. Amend. IV 41
U.S. Const. Amend. XIV 40
5 U.S.C. § 706(2)(A) 21
5 U.S.C. § 706(2)(E) 21

Page

28 U.S.C. § 2342 27
29 U.S.C. § 201, *et seq.* .....
29 U.S.C. § 261 .....
42 U.S.C. § 1973, *et seq.* (1964 ed., Supp. I) 40
47 U.S.C. § 301 12
47 U.S.C. § 303 12
47 U.S.C. § 303(f) 12
47 U.S.C. § 303(r) 12
47 U.S.C. § 307(a) 12
47 U.S.C. § 307(d) 24
47 U.S.C. § 309(a) 12
47 U.S.C. § 310(b) 12
47 C.F.R. § 73.188 3
47 C.F.R. § 73.315 3
47 C.F.R. § 73.685 3
Fed.R. Crim. P. 11 41

MISCELLANEOUS:

Beytagh, "Ten Years of Non-Retroactivity: A Critique and a Proposal," 61 Va. L. Rev. 1577 (1975) 39
Cable Television Report and Order, 36 F.C.C. 2d 143 (1972) 36
CATV-TV Cross-Ownership Rules, 55 F.C.C. 2d 540 (1975), *reconsideration denied*, 58 F.C.C. 2d 596 (1976), *appeal pending*, No. 75-1933, *et al.*, (D.C. Cir. 1975), *motions for partial stay granted*, June 10, 1977 .....
Comment Note, "Prospective or Retroactive Operation of Overruling Decision," 10 A.L.R. 3d 1371 (1966) 39
Conference Report No. 2426, 82d Cong., 2d Sess. (1952) 11
98 Cong. Rec. 7417-7420 (1952) 11

Page

98 Cong. Rec. H9048-9049 (daily ed. July 2, 1952) 11

Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C. 2d 725 (1966) 36

Hearings on Application for Second VHF Station, 3 P&F Radio Reg. 2d 909 (1964) 36

H.R. Rep. No. 1750, 82d Cong., 2d Sess. (1952) 10

Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg. 2d 271 (1965) 36

Memorandum Opinion and Order, 53 F.C.C. 2d 859 (1975) .....13, *passim*

Multiple Ownership Rules, Docket No. 20548, 63 F.C.C. 2d 824 (1977) 24, 36

Multiple Ownership of Standard, FM, and Television Broadcast Stations, 22 F.C.C. 2d 306 (1970) 36, 38

Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964) 36

Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg. 2d 1501 (1968) .....

Proposed Amendments to the Communications Act of 1934: Hearings on S.814 Before the Senate Comm. on Interstate Commerce, 78th Cong., 1st Sess. (1943) 8

Proposed Amendments to the Communications Act of 1934: Hearings on S.1333 Before the Senate Comm. on Interstate Commerce, 80th Cong., 1st Sess. (1947) 8

Proposed Amendments to the Communications Act of 1934: Hearings on S.1973 Before the Subcomm. on S.1973 of the Senate Comm. on Interstate and Foreign Commerce, 81st Cong., 1st Sess. (1949) 8, 9

Revision of FM Broadcast Rules, 40 F.C.C. 660 (1962) 36

Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 N.Y.U. L. Rev. 632 (1967) 39

Second Report and Order in Docket 18110, 50 F.C.C. 2d 1046 (1975) .....13, *passim*

Page

S. Rep. No. 741, 81st Cong., 1st Sess. (1949) 8, 9, 10, 11

Story, *Constitution,* § 1398 (1898) 34

Supreme Court Rule 42(1) 4

Testimony of Chairman Richard E. Wiley before the Senate Subcommittee on Communications, May 10, 1977 13

Telephone Terminal Equipment Rules, 59 F.C.C. 2d 83 (1976) 36

"The Supreme Court, 1968 Term," 83 Harv. L. Rev. 62 (1969) 38

Wall Street Journal, October 13, 1977, p. 1 16

Wright, Skelly, "The Courts and the Rule Making Process: The Limits of Judicial Review," 59 Corn. L. Rev. 375 (1974) 30

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---

BRIEF OF AMICI CURIAE

FILED ON BEHALF OF DISPATCH PRINTING COMPANY AND THE JOURNAL COMPANY

INTEREST OF AMICI CURIAE

The Dispatch Printing Company ("Dispatch") publishes *The Columbus Dispatch,* an independent daily evening newspaper, and *The Columbus Sunday Dispatch,* a Sunday newspaper, in Columbus, Ohio.[1] Dispatch owns all the stock of WBNS-TV Inc., licensee of WBNS-TV, Channel 10, in Columbus.[2] Dispatch

---

[1] The *Dispatch* competes with a daily morning newspaper, *The Columbus Citizen-Journal,* published by the E. W. Scripps Company.

[2] Dispatch also owns WTHR(TV) in Indianapolis, Indiana.

shareholders also own RadiOhio, Inc., licensee of radio stations WBNS(AM) and WBNS-FM, Columbus. Dispatch began broadcasting AM radio in 1934, and built the Columbus FM station in 1939,[3] and TV station in 1957.

The Journal Company ("Journal") is the publisher of *The Milwaukee Journal,* an independent daily evening and Sunday newspaper, and *The Milwaukee Sentinel,* an independent daily morning newspaper, in Milwaukee, Wisconsin. Journal owns all the stock of WTMJ, Inc.. licensee of WTMJ-TV, Channel 4, in Milwaukee, and of WTMJ(AM) and WKTI(FM) in Milwaukee.[4] Journal built its stations and put them on the air, AM in 1927, TV in 1947 and FM in 1940.

The Journal Company is owned by its employees.[5] This system of employee ownership is unique and guarantees that the company will be owned by people who live in and are involved in the local community.

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[3] WBNS-FM's call letters when it first went on the air were W8XVY.

[4] WTMJ, Inc. also owns Teltron, Inc. which operates cable television systems in Wausau, Wisconsin Rapids, and Stevens Point, Wisconsin.

[5] Starting in 1937, shares of The Journal Company stock were placed in trust. Employees can buy a "unit of beneficial interest," which confers all the rights of common voting stock ownership, except that the units must be resold to other active employees when an owner ceases to be an employee. Units are allocated on the basis of each employee's responsibility, leadership, contributions to the success of the company and length of service. Employees of WTMJ, Inc. as well as employees of The Journal Company participate in this employee ownership arrangement. Currently, 1316 employees are unit holders of over 88% of the total stock of The Journal Company.

After a seven year rulemaking proceeding, the Federal Communications Commission (hereinafter "the Commission") adopted rules forbidding the prospective formation of combinations of a newspaper and a broadcast station (radio or television) located in the same community,[6] but limiting retroactive application of the rule to existing combinations located in communities served by only one daily newspaper and one broadcast station. In the case of one newspaper-one broadcast station communities, the Commission order required one of these interests to be divested within five years.

The court of appeals upheld the prospective portion of the rules (FCC App. A, p. 33),[7] but held invalid the Commission's determination not to apply the cross-ownership rule retroactively. (FCC App. A, p. 60.)[8]

The Commission rule invalidated by the court of appeals would have permitted Dispatch and Journal to retain their co-located newspaper and broadcast stations so long as the stations continue to serve the public interest. The decision of the court of appeals, if upheld, would affect Dispatch and Journal substantially and adversely, by forcing each of them to divest

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[6] That is, ownership of a newspaper located within the City Grade signal, *i.e.*, primary service area, of a commonly owned broadcast station. *See* 47 C.F.R. §§ 73.685, 73.315, 73.188. For ease of reference, such co-location is referred to herein as "in the same community."

[7] References to appendices are to those contained in the Appendix filed by the Federal Communications Commission to its petition for a writ of certiorari.

[8] WBNS-TV, Inc. and The Journal Company and WTMJ participated in the Federal Communications Commission rulemaking proceeding, but were not intervenors in the court below.

either its newspaper or its broadcast stations, located respectively in Columbus and Milwaukee, unless each could make a showing of special circumstances. (FCC App. A, p. 60.)

Dispatch and Journal have obtained written consent of all the parties below to the filing of this brief as *amici curiae* pursuant to Rule 42(1) of the Rules of this Court, and have filed these consents simultaneously with this brief.

SUMMARY OF ARGUMENT

The Commission, after a lengthy rulemaking proceeding, adopted a rule in regard to the cross-ownership of newspapers and broadcast stations, which prohibited future combinations of commonly owned broadcast facilities in the same community, permitted the continued existence of such combinations in communities with more than one media outlet, and required divestiture in communities where there was only one media voice. The court below upheld the Commission's prospective ban, but invalidated the "grandfathering" and ordered the Commission to adopt a specific rule in regard to existing cross-ownerships which gives diversity of ownership "controlling weight."

Congress has indicated that it did not delegate to the Commission the power to make a general rule which denies broadcast licenses to newspaper owners. The question was fully considered in 1952, and Congress concluded that the Commission had no such power. Thus, the Commission could not promulgate any blanket rule in regard to the grant or denial of broadcast licenses to newspaper owners, including the prospective rule upheld by the court below.

By replacing the rule in regard to cross-ownership selected by the Commission with a rule more to its liking, the court below improperly usurped a basic policy judgment allocated by Congress to the Commission. It improperly immersed itself in weighing the evidence to restrike the balance between permitting and prohibiting cross-ownership. But a reviewing court may not invalidate an agency decision merely because it would weigh the factors involved in that decision in a manner different from the balancing engaged in by the agency. Nor may a reviewing court command the Commission to adopt a specific rule selected by it. Thus, the court below both exceeded the proper scope for judicial review and trespassed beyond the boundaries established by the separation of powers.

The court of appeals also determined that the Commission's decision limiting the impact of its cross-ownership ban to future acquisitions or constructions of broadcast facilities was irrational. (FCC App. E, p. 165.) This determination flies in the face of the history of administrative, legislative and judicial action, and of common sense. It can be read as little more than a statement that the court may enforce its own policy in regard to cross-ownership, and not that of the Commission.

The briefs of the various petitioners in this case present a variety of issues, which need not be reviewed or restated here.[9] This brief concentrates on the three

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[9] Amici endorse the positions taken by other parties: (1) that the Commission lacks authority to adopt blanket rules prohibiting newspaper ownership of broadcast stations; and (2) opposing the requiring of divestiture by newspapers of broadcast stations now owned by them.

questions summarized briefly above, namely:

1. Did the court below and the Commission wrongfully conclude that the Commission had the authority to promulgate a general rule prohibiting the grant of licenses for broadcast facilities to newspaper owners?
2. Does the decision of the court of appeals improperly usurp the function allocated by Congress to the Federal Communications Commission, in view of the fact that Congress assigned to the Commission, and not to the courts, the responsibility to determine the "public interest, convenience and necessity" in regulating broadcast licensing?
3. Was the Commission acting reasonably within its delegated powers when it changed its rules and practices only with respect to prospective cross-ownership of newspapers and broadcast facilities?[10]

ARGUMENT

I.

CONGRESS HAS MADE IT CLEAR THAT IT HAS DELEGATED NO POWER TO THE COMMISSION TO MAKE A GENERAL RULE DENYING BROADCAST LICENSES TO NEWSPAPER OWNERS.

The initial question in this group of cases is whether Congress has delegated to the Commission any authority to refuse to issue a broadcast license on the ground of common ownership of a broadcast station with a newspaper, or to refuse to renew a broadcast license

[10] The question of the few communities in which the only print and broadcast media were commonly owned, the so-called "egregious cases," dealt with separately by the Commission, is not considered in this brief.

in that circumstance. This question raises problems of delegation of powers. It also raises problems under the First Amendment, and these are important in two aspects, first, as to the constitutional power of Congress, and second, as to the effect which such constitutional questions should have on the construction of the power which Congress has actually delegated to the Commission.

These questions are discussed in full in briefs filed by the parties in this case, particularly in the briefs filed by the American Newspaper Publishers Association and the National Association of Broadcasters. Although this brief is primarily devoted to the question of the "grandfather clause" in the Commission's order, the interest of the *amici curiae* will be protected if it is decided that the Commission did not have power delegated to it to make a rule placing a special restriction on the ownership of broadcast stations by newspapers. Accordingly, the *amici curiae* fully support the briefs filed by the parties which contend that the Commission has no such power. If this contention is upheld, then the "grandfather" question is no longer relevant.

There is one aspect of the question of the Commission's basic power to which it is appropriate to call special attention. The fact is that Congress has considered this question, and has made it as clear as it is possible to do without an actual statutory provision that the Commission has not been given power to discriminate against newspapers in the licensing of broadcast facilities.

This specific question, which Congress had been considering for about a decade,[11] was presented to and acted upon by Congress in 1952. Previously, in 1949, a bill, S. 1973, designed to amend several sections of the Communications Act of 1934 was pending before a Senate subcommittee. One of the proposals under consideration was an amendment introduced by Senator Ernest McFarland which was intended to deny the Commission the power to restrict ownership of broadcast facilities by newspapers.[12] The Acting Chairman of the Commission, Rosel Hyde, testified before the subcommittee of the Senate Committee on Interstate and Foreign Commerce that the Commission did not have power to make a blanket rule preventing all persons engaged in a particular business, such as publishing newspapers, from obtaining a license, even if such action was believed to be in the public interest. *Proposed*

[11] *Proposed Amendments to the Communications Act of 1934: Hearings on S. 814 Before the Senate Comm. on Interstate Commerce,* 78th Cong., 1st Sess. 80-85 (1943); *Proposed Amendments to the Communications Act of 1934: Hearings on S. 1333 Before the Senate Comm. on Interstate Commerce,* 80th Cong., 1st Sess. (1947).

[12] The amendment provided:

> "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the Commission and as authorized by law. The Commission shall make or promulgate no rule or regulation of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon race, religious or political affiliation, or kind of lawful occupation or business association."

S. Rep. No. 741, 81st Cong., 1st Sess. 3 (1949). In regard to this amendment, the Acting Chairman of the Commission, Rosel Hyde, submitted written testimony stating: "The principal intent of the section is, of course, to outlaw the possibility of any rule excluding newspaper owners from owning radio stations." *Proposed Amendments to the Communications Act of 1934: Hearings on S. 1973 Before the Subcomm. on S. 1973 of the Senate Comm. on Interstate and Foreign Commerce,* 81st Cong., 1st Sess. 20-21 (1949).

Amendments to the Communications Act of 1934: Hearings on S. 1973 Before the Subcomm. on S. 1973 of the Senate Comm. on Interstate and Foreign Commerce, 81st Cong., 1st Sess. 42-44, 103-105 (1949).

After Chairman Hyde's testimony, the subcommittee eliminated the proposed amendment from the bill. When the full committee reported the bill to the Senate floor, it commented on the reasons for omitting the amendment:

> "This language was first proposed nearly 6 years ago during hearings on a Communications Act amendments bill, solely because the Federal Communications Commission at that time had under consideration a rule which would prohibit newspapers from becoming holders of radio licenses. While the Commission may have been motivated, in part at least, by the best intentions in seeking to prevent monopolistic control of organs of public expression in a community, its threatened action was of questionable constitutional validity, particularly in the absence of specific authority in the basic act to adopt such a rule. However, the net effect of the Commission's proposed antinewspaper rule was to deny consideration of applications from newspapers, all such applications having been placed in a pending file. After reflection for some 2 years, the Commission dropped all plans for such a rule and began processing of newspaper applications in the same manner as other applications.

S. Rep. No. 741, 81st Cong., 1st Sess. 2 (1949).

After summarizing the Commission's testimony, the committee concluded:

> It should be distinctly understood that in eliminating the section the committee has done so solely because the Commission is now following

> the procedure which was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional authority to follow any other procedure.

S. Rep. No. 741, 81st Cong., 1st Sess. 3 (1949).

In 1951, a bill, S. 658, which was almost identical to the final version of S. 1973 was adopted by the Senate and went to the House. The House adopted an amendment which provided that:

> "The Commission shall not make any rule or regulation, of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon interest in, association with, or ownership of any medium primarily engaged in the gathering and dissemination of information and no application for a construction permit or station license, or for the renewal, modification or transfer of such a permit or license, shall be denied by the Commission solely because of any such interest, association, or ownership."

H.R. Rep. No. 1750, 82d Cong., 2d Sess. 9 (1952).

When the bill went to conference, the Conference Committee eliminated the House amendment. But the Conference Committee Report made it clear that the provision was omitted because the Conference Committee found it unnecessary. It stated:

> "It is the view of the conference committee that under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper. . . . Also the Commission could not arbitrarily deny any application solely because of any such interest or association."

Conference Report No. 2426, 82d Cong., 2d Sess. 19 (1952). The discrimination to which the amendment responded, and which the Conference Report stated the Commission was not authorized to make, was against the denial of broadcast licenses by the Commission because the prospective licensee was commonly owned with newspapers or news disseminating agencies. 98 Cong. Rec. 7417-7420 (1952); 98 Cong. Rec. H9048-9049 (daily ed. July 2, 1952).

Thus, Congress, by formal, published action, approved by both Houses of Congress, made it clear that it did not regard the Commission as having any power delegated to it to discriminate against newspapers in the ownership of broadcast facilities. The views of Congress may or may not have changed in the meantime. When Congress has denied that it has made a delegation of power, however, such a delegation can hardly be inferred from subsequent inaction. In view of the delicacy of the area, and the nationwide impact of any change, this clear delineation of the Commission's powers should remain binding on it until Congress determines to extend the powers which it said it did not delegate when it last formally gave consideration to this question.

II.

DETERMINATIONS OF "PUBLIC CONVENIENCE, INTEREST, AND NECESSITY" HAVE BEEN DELEGATED BY CONGRESS TO THE COMMISSION AND NOT TO THE COURTS, AND THE COURT BELOW, BY ITSELF MAKING SUCH A DETERMINATION, EXCEEDED THE PROPER SCOPE OF JUDICIAL REVIEW.

The Communications Act of 1934 provides not only that the Commission shall make regulations to carry

out the provisions of the Act, 47 U.S.C. § 303(f),[13] but also that:

> "The Commission, if public convenience, interest, or necessity will be served thereby, . . . shall grant to any applicant therefor a station license provided for by this Chapter." 47 U.S.C. § 307(a).[14]

Congress thus delegated to the Commission the authority both to determine what radio or television license applicants shall be granted licenses and to make regulations to implement such determinations in the "public convenience, interest, and necessity."[15]

A. The Intent, As Well As The Effect Of The Decision Of The Court Below, Was To Usurp The Commission's Responsibility To Determine The Public Interest.

Pursuant to this licensing and rulemaking authority, the Commission determined that the public interest would be promoted by (1) prohibiting future com-

[13] Section 303, 48 Stat. 1082, as amended, 47 U.S.C. § 303(f) provides, in pertinent part, that "the Commission from time to time, as public convenience, interest, or necessity requires shall—[m]ake such regulations not inconsistent with law as it may deem necessary . . . to carry out the provisions of this Act . . ." *See also* 47 U.S.C. § 303(r).

[14] *See also* 47 U.S.C. §§ 301, 303(r), 309(a) and § 310(b).

[15] This Court has long recognized the Commission's delegated responsibility for licensing decisions. It has stated in regard to licensing that:

> "'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

binations of daily newspaper and broadcasting stations in the same community; (2) breaking up within five years existing combinations of daily newspaper and broadcasting stations in communities where there was no other media voice; and (3) permitting continued operation, or "grandfathering," of existing combinations in communities with other media outlets. (FCC App. B, pp. 90-91.)[16]

The court of appeals disagreed with the Commission's decision in regard to existing cross-ownerships. It disregarded the results of an extensive, seven year long rulemaking proceeding conducted by the Commission, in which, if the Commission had power, it was engaging in what is clearly delegated legislative action.[17] Should the decision of the court below be permitted to stand, it would transform patterns of ownership of newspaper and television and radio stations,[18] developed as a result of actions of and policies established by the Federal Communications Commission,[19]

[16] Second Report and Order in Docket 18110, 50 F.C.C.2d 1046 (1975); Memorandum Opinion and Order, 53 F.C.C.2d 859 (1975). (FCC App. B and C, pp. 61-158.)

[17] *See* text, *supra*, pp. 11-12, and n. 13 and n. 14, at p. 12, *supra*.

[18] Respondents acknowledge the "considerable impact" of the decision below. Opposition to Petitions for a Writ of Certiorari, at 7.

[19] *See* Testimony of Chairman Richard E. Wiley before the Senate Subcommittee on Communications, May 10, 1977:

> "For many years, the Commission encouraged newspaper-broadcast cross-ownership because of the important contribution it believed such owners would make to the development of radio and, later, television broadcasting. The Commission repeatedly found that licensing broadcast stations to newspaper owners in the same community was in the public interest and otherwise consistent with agency policy."

which have served the public well for more than 50 years. The decision below would do this without any action by Congress and against the considered judgment of the agency established by Congress to formulate policy in this area. The court of appeals did not decide that the Commission cannot make a particular rule (as was unsuccessfully contended in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), for example). Rather, the court below has commanded that the Commission make the particular rule selected by the court. That is essentially legislative action. No case is known of such judicially mandated legislative action. Surely, a court could not properly command Congress to pass such a statute, and, under proper concepts of separation of powers, it should have no power to command affirmative legislative action by Congress' delegatee. Indeed, this Court refused to order the adoption of a legislative rule in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1972),[20] reflecting the long-standing principle that it is the administrative agency, to which Congress has delegated legislative authority, and not the courts, which is to make legislative rules.

In the opinion of the court below, "the Commission could not have rationally concluded that the compet-

[20] In that case, the Commission refused to adopt a rule requiring broadcasters to accept editorial advertisements. The court of appeals disagreed. It "remanded the case to the Commission to develop procedures and guidelines for administering a First Amendment right of access." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, 412 U.S. at 97. Even though the court of appeals remanded the case to the Commission to develop principles in accord with its decision, whereas here the court of appeals directed the principles to be adopted, this Court refused to order the Commission to adopt what was essentially a legislative rule developed by the court of appeals. *Id.*

ing policies it offered justified grandfathering absent a show of harm." (FCC App. A, p. 56.) It therefore ordered that "divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." (FCC App. A, p. 60.) It did not, therefore, simply remand to the Commission for further rulemaking consistent with its opinion, but rather "required" that a specific rule be adopted because, in the court's view, it is the only rational rule. (FCC App. A, pp. 56, 60, and FCC App. E, p. 165.)

There can be no doubt that the court of appeals did not intend simply to remand for a consistent result, but rather its purpose was to compel adoption of the rule favored by it. In granting a stay of its mandate, it said (FCC App. E, p. 167):

> "Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules [prohibition of cross-ownership], and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone [all existing as well as prospective cross-owners] would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt. . . .)."

The Commission and the court of appeals did not disagree on several of the factors which comprise the public interest. There was no disagreement, for example, that the First Amendment objectives of preserving "an uninhibited marketplace of ideas in which

truth will ultimately prevail . . . ," *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), and that nurturing "the widest possible dissemination of information from diverse and antagonistic sources . . . ," *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), are appropriate factors in determining the public interest.[21] But the court of appeals clearly dis-

[21] Both the Commission and the court of appeals took as a common point of origin that any analysis of the First Amendment questions raised by this case starts with the presumption that the inherent scarcity of the broadcast spectrum necessitates, and, indeed, justifies some sort of government regulation. *See, e.g., Red Lion Broadcasting Co.* v. *FCC, supra.* It may be, however, that this part of the doctrine of broadcast regulation needs review and rethinking.

The broadcast spectrum may be no longer such a scarce resource. As *The Wall Street Journal* recently described, October 13, 1977, p. 1, there has been a tripling of the number of applications for ultra high-frequency or UHF channels over two years ago. It also reported that there are 400 unused UHF channels available for commercial broadcasting, as well as approximately 80 very high-frequency or VHF channels. There have been large advances in satellite, cable, microwave and other technologies in recent years. These developments may mean that scarcity is no longer an adequate foundation on which to erect a complex structure of First Amendment and regulatory values. As Judge Bazelon has pointed out, there are more broadcast stations than daily newspapers, and neither the radio nor the television spectrum is completely filled. For this, and other reasons, Judge Bazelon concluded that the time to re-examine the scarcity doctrine may be here. *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16, 64-79 (D.C. Cir. 1972) (Bazelon, J., dissenting), *cert. denied*, 412 U.S. 922 (1973). *Cf.* Judge Bazelon's view of scarcity in the decision below. (FCC App. A, pp. 22-23, n. 31.)

Even if it is assumed, *arguendo*, that the broadcast spectrum is a scarce resource, this notion does not justify or compel divestiture of existing facilities. Nor do the implications of the scarcity argument cut with equal force in radio and television, in markets with three stations and markets with thirty, in markets with their own local weekly newspapers or own magazines and those which have none. These substantive considerations were ignored by the court below, which recited the word "scarcity" as a kind of unquestioned and unquestionable truth.

"Scarcity" is only another word for "value." How to maximize or distribute the value of the broadcast spectrum is an area entrusted by Congress to the Commission as part of its mandate to administer this resource in the public interest. The public interest demands diversity of voices, *i.e.*, "outlets of self-expression," not diversity of ownership. In some cases, "voice diversity" and "ownership diversity" may go hand in hand; in others, they may not. In order to sift out such complicated choices, Congress mandated that the public interest in the effective use of the broadcast spectrum be determined through rules devised on the basis of experience and expert judgment, rather than through rigid judicial assertions of logic.

agreed with the Commission about (1) who is to make the decision that these objectives will be promoted, and (2) what factors should enter that decision, and their appropriate weights.

B. The Usurpation By The Court Below Of The Commission's Responsibility Was Improper.

The court of appeals would eliminate the Commission's authority to weigh competing public interest licensing considerations where cross-ownership of daily newspaper and broadcast facilities is involved. In all cases where cross-ownership exists, the court commands the Commission to refuse to grant a license in the absence of a showing that the cross-ownership is in the public interest sufficient to rebut the "presumption" "compelled" against it. (FCC App. A, p. 60.) Thus divestiture becomes the rule, not the exception. The Commission, on the other hand, sought to promote the objective of a free, competitive, marketplace of ideas disseminated from diverse sources by grandfathering, which permits gradual evolution by marketplace

transfers rather than revolution by forced sale of properties in 50 television markets and 160 newspaper-radio combinations. Thus, under the Commission's view, divestiture was to be the exception not the rule.

By thus reformulating the rule in regard to cross-ownership, the court substituted its judgment for that of the Commission as to what cross-ownership rule would best promote the public interest. This decision usurps the Commission's congressionally mandated responsibility by transferring a basic policy judgment from the Commission to the court.[22] It thus violates the separation of powers. This Court has stated that: "This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive'." *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 380, *quoting National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943).

It is a "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 381. A reviewing court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). Yet the court of appeals did not follow the Commission's construction of Section 303 of the Communications Act, the public

[22] The court of appeals conceded that it was dealing with a policy matter. It stated: "We summarize the record only to the extent necessary to show that in determining its divestiture policy, the Commission necessarily had to rely on *policy,* not factual considerations." (FCC App. A, pp. 37-38; emphasis added.)

interest mandate. Rather, it exceeded the proper scope for judicial review by substituting its judgment for that of the Commission.

1. *The Court Below Improperly Undertook To Weigh The Evidence.*

The court of appeals based its conclusion that divestiture of all cross-owned facilities is required on its own weighing of the record evidence. (FCC App. A, pp. 49, 52-58.) But this Court has expressly stated that in judicial review (speaking of the Interstate Commerce Commission):

> "We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported."

United States v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 749 (1972).[23]

The Court of Appeals for the Second Circuit, in a case involving the Federal Communications Commission, reached a similar result. It stated that it is not a reviewing court's "function to weigh the evidence in support of these various points of view. [A court] should not, and indeed cannot, substitute [its] judgment for that of the Commission." *Mt. Mansfield Television, Inc.* v. *FCC,* 442 F.2d 470, 482 (2d Cir. 1970).

[23] Of course, as discussed below, an inquiry into the rationality of the conclusions reached by an administrative agency cannot be used by a reviewing court to mask its disagreement with the wisdom of the agency's policies.

That court also concluded that it was the Commission's proper function to make estimates and forecasts based on the record evidence.[24] The "fact that there is vigorous disagreement as to the effect of the rule does not prevent the Commission from acting or require this court to reassess the probabilities." *Ibid.* at 483-484. By reweighing and rebalancing the evidence in order to reach its own conclusion in regard to divestiture, the court below exceeded the proper scope of judicial review.

2. *A Court May Not Conclude That An Agency Decision Is Invalid Merely Because It Would Weigh The Factors Involved In That Decision Differently Than The Agency.*

An administrative decision may not be set aside by a reviewing court unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

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[24] In *American Airlines, Inc.* v. *CAB*, 192 F.2d 417, 420 (D.C. Cir. 1951), the court of appeals stated, in regard to certificates of public convenience and necessity to be issued by the Civil Aeronautics Board, that—

> "the regulatory function . . . is a forward-looking function, as any examination of regulatory measures easily demonstrates. . . . When a regulatory action contemplates a proposed development, new, not existing, a type of judgment is required which is wholly absent from the mere evaluation of past facts to ascertain a present or past fact. It is in the exercise of that sort of judgment that the much discussed expertise of administrative agencies finds its greatest value. Here is the field of uncertainties, imponderables and estimates. This is where the rule that a conclusion within the realm of rational deduction or inference stands despite differences of opinion, has its greatest applicability."

See also Connecticut Committee Against Pay TV v. *FCC*, 301 F.2d 835, 837 (D.C. Cir. 1962).

law." 5 U.S.C. § 706(2)(A).[25] To reach this question, a reviewing court may consider only whether the administrative decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 416;[26] *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

There can be no doubt that the Commission engaged in extensive "consideration" of the various factors relevant to the public interest which were raised in the course of the rulemaking. The Commission's order was based on many thousands of pages of written evidence, including the submission of one or more sets of comments and studies by over 200 parties, and two and one half days of argument by some 45 scheduled parties. The Commission orders occupy 118 pages.[27] The court of appeals, however, concluded not that

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[25] While there is some question as to whether this standard or the so-called "substantial evidence" standard for judicial review, 5 U.S.C. § 706(2)(E), applies, the issues raised by the court of appeals decision would be the same in either case in light of the extensive record developed in this proceeding. Indeed, some courts have concluded that the differences between sections 2(A) and 2(E) are more apparent than real. *See, e.g., Associated Industries of New York State, Inc.* v. *Dept. of Labor*, 487 F.2d 342, 349-350 (2d Cir. 1973) (Friendly, J.).

[26] At least one panel of the Court of Appeals for the District of Columbia Circuit has recognized that the reference to "error of judgment" does not replace or change the traditional arbitrary and capricious standard of review. *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 34-35, n. 74 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

[27] This Court found the extent of the record developed by the Commission in regard to Chain Broadcasting Regulations significant. *See National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 195, 225.

there had been insufficient "consideration," but that the Commission in weighing the relevant factors, had failed to reach the "proper" balance of them, a balance in which divestiture was required.

The Commission's decision resulted from consideration of many significant factors in addition to promotion of diversity of information sources, including: (1) potential dislocation of existing service (FCC App. B, p. 93); (2) the benefits of existing local ownership and involvement in broadcast operations (FCC App. B, p. 93); (3) the superior past performance of many cross-owners (FCC App. B, p. 93, n.26); (4) the existence of competing media voices in affected communities (FCC App. B, p. 96); and (5) the potential for deterioration in local programming service and quality which might result from purchasers of divested stations bearing burdensome capital costs (FCC App. B, p. 93). The Commission found no harm to the public interest resulted from the existing cross-ownerships which it concluded should be grandfathered. (FCC App. B, pp. 90, 95, 104.) In such a circumstance, basic equitable considerations weigh heavily against divestiture.[28]

The Commission properly paid particular attention to the local and service aspects of broadcasting in assessing the relative weight to be given these factors. This Court has endorsed this emphasis on localism and on service in stating that: "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *FCC* v. *Sanders Brothers Radio Station,*

[28] *Cf. National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 207.

309 U.S. 470, 475 (1940). The court of appeals had previously endorsed the Commission's view that superior past performance by a licensee is an important public interest consideration. It has stated: "The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." *Citizens Communications Center* v. *FCC,* 447 F.2d 1201, 1213, n. 35 (D.C. Cir. 1971). It has also stated that "The proper weight to be given past performance is, of course, a matter for the Commission's judgment." *Fidelity Television, Inc.* v. *FCC,* 515 F.2d 684, 709 (D.C. Cir.), *cert. denied,* 423 U.S. 926 (1975). But the court of appeals has now written the local service and past performance concepts out of the statute in cases involving cross-ownership.

Nowhere has this Court stated that diversity of information sources, either on a local or a national level, is the overriding or determinative element of the public interest.[29] In fact, until now, the court of appeals itself has never raised diversity to such a preeminent position. Indeed, it has done the opposite. It has said that "avoiding concentration of control in communication is such an important objective that the Commission must be accorded discretion in choice of measures for its fulfillment." *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, 860 (D.C. Cir. 1970), *cert. denied*

[29] The court below rested its opinion on the central importance to the First Amendment of diversity. But the First Amendment does not *require* content diversity, let alone ownership diversity, nor does it require any particular form of governmental regulation to be adopted to promote diversity. *See Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1972).

sub nom. WHDH, Inc. v. *FCC,* 403 U.S. 923 (1971). In regard to competing license applications, the court of appeals has held that the Commission was entitled to consider diversification of control "in connection with all other relevant factors and to attach such significance to it as its judgment dictates." *McClatchy Broadcasting Co.* v. *FCC,* 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 918 (1957).

In this case, the court of appeals has decided that the Commission should no longer be accorded discretion in choosing measures to fulfill the objectives of diversity.[30] Neither the protections afforded by the Fairness Doctrine,[31] nor the Commission's ability to review license performance in triennial license renewal proceedings, 47 U.S.C. § 307(d), nor the Commission's authority to issue further rules to prevent abuses,[32] are considered appropriate measures. The Commission's judgment as to the "significance" to be accorded diversification of control and its expert ability to consider it as one of a number of public interest factors is trampled by the determination of the court below that its policy of "giving diversity of media ownership con-

[30] Only in waiver situations (FCC App. A, p. 60) would the court of appeals accord the Commission any discretion at all. But this Court has said that the public interest standard "no doubt leaves wide discretion and calls for imaginative interpretation." *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 90 (1953).

[31] *See Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969).

[32] For example, the Commission has recently issued a Report and Order in regard to rules to prohibit certain other forms of concentration of control, *e.g.,* ownership of three broadcast stations where any two are within 100 miles of the third, or where the primary service contour of related stations overlaps. ***Multiple Ownership Rules,*** Docket No. 20548, 63 F.C.C.2d 824 (1977).

trolling weight" must be followed. (FCC App. E, p. 167.)

The elevation of ownership diversity as the *sine qua non* of "relevant factors" represents a policy judgment by the court of appeals that displaces the Commission's judgment with its own. Yet, competing policy judgments are the very "area where administrative judgments are entitled to the greatest amount of weight by appellate courts." *SEC* v. *Chenery Corp.,* 332 U.S. 194, 209 (1946). The Commission considered and weighed the factors relevant to this policy determination. It struck a balance between no rule at all, and a rule—now ordained by the court of appeals—ordering total divestiture. "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *The Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968).[33]

The importance of following this precept is heightened because "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed

[33] *Cf. National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 218, where the Court stated: "We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations." *Accord: Public Interest Research Group* v. *FCC,* 522 F.2d 1060, 1066 (1st Cir. 1975), *cert. denied,* 424 U.S. 965 (1976), where the court warned that it could not reverse the Commission "[unless] the standard of rationality is to be narrowed to a circle no wider than a court's private judgments. . . ."

is a task of great delicacy and difficulty." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 102. Thus, the Court concluded, a reviewing court "must afford great weight to the decisions of Congress and the experience of the Commission." *Ibid.* In short, a reviewing court, within the context of "the vaguish, penumbral bounds expressed by the standard of 'public interest' " must do no more than "to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest." *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 91 (1953).[34] The court of appeals did more. It therefore went beyond the boundaries of proper judicial review.[35]

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[34] *See FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946): "But it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial or administrative discretion since Congress has confided the problem to the latter." This precept applies as much to rulemaking as to adjudication. *See also Public Interest Research Group* v. *FCC,* 522 F.2d 1060, 1064 (1st Cir. 1975), *cert. denied,* 424 U.S. 965 (1976): "We have no license to regulate broadcasting nor to impose our private views of the public welfare." *Accord: Radio Relay Corp.* v. *FCC,* 409 F.2d 322, 326 (2d Cir. 1969); *National Ass'n of Independent Television Producers and Distributors* v. *FCC,* 516 F.2d 526, 534 (2d Cir. 1975).

[35] *Cf. Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76-419, to be argued November 28, 1977, reviewing *Natural Resources Defense Council, Inc.* v. *Nuclear Regulatory Commission,* 547 F.2d 633 (D.C. Cir. 1976).

3. *The Court Below Exceeded the Proper Scope Of Judicial Review By Commanding The Commission To Adopt A Specific Rule Selected By It.*

The court of appeals ordered the Commission to adopt (FCC App. A, p. 60) a rule that would afford "controlling weight" to diversification. (FCC App. E, p. 167.) As this Court has said, it is a "guiding principle . . . that the function of the reviewing court ends when an error of law is laid bare. At that point, the matter once more goes to the Commission for reconsideration." *FPC* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952). The reviewing court having corrected an error of law, ". . . on remand the Commission is bound to act upon the correction." *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145 (1940). Here, contrary to the Court's instruction in *FPC* v. *Idaho Power Co., supra,* the court of appeals itself determined what rule the Commission should promulgate after remand. But the court of appeals had exhausted its congressionally-granted powers[36] when it laid bare what it regarded as the Commission's error, and compelled obedience to its correction. *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 145.

The Memorandum of the United States concedes this point. The Solicitor General states:

> "The United States agrees with the Commission, however, that the court of appeals exceeded its authority to the extent that it went beyond setting aside the Commission's order and purported finally to decide administratively unresolved questions concerning cross-ownership in advance of their consideration by the Commission in proceedings on

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[36] *See* 28 U.S.C. § 2342, which provides for judicial review of final orders of the Commission in rulemaking proceedings.

remand. See *South Prairie Construction Co.* v. *Local 627, Operating Engineers,* 427 U.S. 800; *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 20. After identifying the deficiencies in the Commission's reasoning, the court of appeals should have remanded the case to the Commission, leaving that agency free, in the exercise of its discretion, to formulate a new rule properly based on a reasoned application of the governing legal principles."

Memorandum of the United States, p. 3.

As the Memorandum of the United States makes clear, the court below could not properly "write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors. . . ." *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 145.[37] The court was in error when—in derogation of the separation of powers—it wrote into law its own perception of the proper weights to be assigned to diversity and divestiture, in the guise of correcting purported Commission irrationality.[38]

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[37] In *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 135, the Court said that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *See also NLRB* v. *Food Store Employees Union,* 417 U.S. 1, 9 (1974). This principle permits the agency to hew to its legislative policy determinations corrected only for legal, rather than policy, errors.

[38] *See National Broadcasting Co.* v. *FCC,* 516 F.2d 1101, 1159, n. 8 (D.C. Cir. 1975), *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co.,* 424 U.S. 910 (1976), where Bazelon, J., in his dissent from the order vacating the previous order granting rehearing *en banc,* noted that this principle had too often been honored in the breach.

C. The Court Below Trespassed On The Principle Of Separation Of Powers.

Limitations on judicial review have been mandated by this Court for substantial, practical, and more importantly, constitutional reasons. These limitations cannot—and should not—now be overturned. To do so would be to do violence not only to the constitutional doctrine of separation of powers, but also to wise judicial administration.

The Constitution sets up three branches of government, the Legislature, the Executive and the Judiciary. Judicial overreaching transgresses these constitutionally required boundaries. Rulemaking is closely akin to legislation. Some would argue that it is essentially delegated authority to legislate. If Congress were to pass a statute identical to the rules promulgated by the Commission, it is highly unlikely that such a statute would be challenged as irrational because it included a grandfather provision. A court cannot so challenge a legislative rule without transgressing the Constitutional boundaries.

In addition, selection of the appropriate policies to achieve the mandate of a statute, and of the particular means to promote these policies are an "administrative not a judicial decision." *FPC* v. *Idaho Power Co., supra,* 344 U.S. at 21.[39] A court may not make such administrative decisions under the guise of holding regulations to be "arbitrary and capricious" or irrational as a means of cloaking its underlying determination that the regulations "are unwise, that they are not

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[39] Additionally, licensing, which is what the Commission's orders were dealing with, is a "purely administrative" function. *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464, 467 (1930).

likely to succeed in accomplishing what the Commission intended. . . . 'We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission'." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 244, *citing Board of Trade* v. *United States,* 314 U.S. 534, 548 (1942). *See also Radio Corp. of America* v. *United States,* 341 U.S. 412, 420 (1951).[40] A constitutional court "cannot . . . participate in the exercise of functions which are essentially legislative or administrative." *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464, 469 (1930).

The Chain Broadcasting Regulations, which *inter alia* limited the number of stations which could be owned by a network, were designed to ensure that licensees make the fullest and most effective use of available channels. *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 218. In reviewing those Regulations, this Court said: "It is not for us to say that the 'public interest' will be furthered or retarded by the . . . regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 224. *See also American Telephone & Telegraph Co.* v.

[40] In the *RCA* case, which involved standards for color television transmission, the Court noted that although the wisdom of the Commission's decision might be contested, and indeed, that two Commissioners had dissented from it, "the courts should not overrule an administrative decision merely because they disagree with its wisdom." *Accord: Radio Relay Corp.* v. *FCC,* 409 F.2d 322, 326 (2d Cir. 1969); *Cornell* v. *United States,* 427 F.2d 680, 683-684 (2d Cir. 1970); *FCC* v. *Schreiber,* 381 U.S. 279 (1965). *Cf.* Skelly Wright, "The Courts and The Rule Making Process: The Limits of Judicial Review," 59 Corn. L. Rev. 375, 391 (1974).

United States, 299 U.S. 232, 236-237 (1936). By ordering that the Commission must give diversification "controlling weight" (FCC App. E, p. 167), the court below disregarded these precepts and "usurped an administrative function." *FPC* v. *Idaho Power Co., supra,* 344 U.S. at 20."

This Court has noted that there are practical reasons, as well as constitutional reasons, which should prevent judicial overreaching and rulemaking. For example, *ad hoc* determination by a reviewing court should not foreordain or disturb an agency's orderly development of policy. *United States* v. *Saskatchewan Minerals,* 385 U.S. 94 (1966); *FPC* v. *Idaho Power Co., supra.* "[T]he exercise of [the Commission's] functions gives it accumulating insight not vouchsafed to courts dealing episodically with the practical problems involved. . . ." *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 96 (1953). Judicial imposition of a rule improperly impinges on the agency's duty to reconsider the entire case. *United States* v. *Saskatchewan Minerals, supra.* Judicial assumption of the power to make ultimate policy decisions is "not conducive to the development of habits of responsibility in administrative agencies." *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 146. It is similarly not conducive

[41] *Cf. National Ass'n of Independent Television Producers and Distributors* v. *FCC,* 516 F.2d 526, 543 (2d Cir. 1975), where the court held that the Commission cannot be compelled to adhere to an order with certain parts deleted by the court. Accordingly, the case was remanded to the Commission to be reconsidered in light of the court's opinion. A similar result was reached in *National Ass'n of Motor Bus Owners* v. *FCC,* 460 F.2d 561 (2d Cir. 1972), where the court found that remand was the only course when it had determined that the Commission had not made the requisite finding. It did not make that finding itself.

to orderly and sound judicial administration. This Court has warned that the administrative process and the courts "are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). "Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 15 (1942). The court below, in commanding the Commission to adopt a certain rule, failed to respect the independence and the assigned function of the Commission.

III.

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE COMMISSION'S DETERMINATION THAT ITS NEW RULE SHOULD NOT GENERALLY BE APPLIED RETROACTIVELY WAS IRRATIONAL.

The court of appeals upheld the Commission's prohibition of new cross-ownerships of daily newspapers and broadcast facilities. But it then concluded that failure to give this prohibition retroactive effect and eliminate all existing cross-ownership was irrational. (FCC App. E, p. 165.) This conclusion, extrapolated from the Commission's orders, and assertedly based on logic, was not and cannot be supported. It flies in the face of settled ideas about the desirability of retroactive administrative action, and the long-established proper practices of the Commission, the Congress and many courts, including this Court.

A. Rationality Does Not Require Retroactivity.

An agency may give retroactive effect to a regulation. Indeed, as this Court has noted, every new administrative principle may have some retroactive effect. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1946). But retroactivity is not compelled in order for a regulation to be considered rational and valid. The usual question is not whether reason compels retroactivity, but whether retroactivity can meet the test of reasonableness. *Ibid. See, e.g., General Telephone Co. of the Southwest* v. *United States*, 449 F.2d 846, 863 (5th Cir. 1971) ("Where a rule has retroactive effects, it may nonetheless be sustained *in spite of* such retroactivity if it is reasonable.") (emphasis added); *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967). The court of appeals has held that even though the agency charged with administering the statute has found no harm to the public from making its new rule with respect to cross-ownership generally prospective only, the absence of retroactive operation is not rational. This stands logic, experience and precedent on its head.

This Court's decisions show that retroactivity is not mandatory for administrative actions. Nearly a century and a half ago, in *United States* v. *McDaniel*, 7 Peters 1, 14 (1833), this Court dealt with administrative practices affected by a later statute. It said: "And no change of such usages can have a retrospective effect, but must be limited to the future." More recently, this Court has said that in administrative action, "law should avoid retroactivity as much as possible." *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 620 (1944). In determining whether it is permissible —not mandatory—for an administrative agency to give retroactive effect to its actions, "Retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to

legal and equitable principles." *SEC* v. *Chenery Corp., supra,* 332 U.S. at 203.[42]

Retroactive application of the Commission's order must also be balanced against equitable and legal principles—a process the court below eschewed. The practice of the Commission in regard to cross-ownership had been well-settled when the order at issue here was adopted. (FCC App. B, p. 90.) No change in circumstances had occurred. The Commission carefully considered and balanced the potential mischief which might result from retroactive application of its order. *See* pp. 22-24, *supra,* and FCC App. B, pp. 89, 93, 95. A court cannot rightly undertake to restrike that balance.

Legal considerations also support non-retroactive application of the Commission's order. The Commission was engaged in a rulemaking proceeding. This is essentially legislative action. Legislation takes a prospective course. This Court has upheld legislative "grandfathering," or prospective-only application of a statute, as a permissible means to respond to "the felt need for regulating . . . through familiar administrative devices, while at the same time [satisfying] the dictates of fairness by affording sanction for enterprises theretofore established." *United States* v. *Maher,* 307 U.S. 148, 153 (1939). The same considerations are applicable to rulemaking. Prospective-only operation for legislation is derived from an enduring and strongly felt distaste for retroactive lawmaking, rooted in concepts of due process and, as the Court

[42] *See also Retail, Wholesale and Dep't Store Union* v. *NLRB,* 466 F.2d 380, 390 (D.C. Cir. 1972), for a reformulation and application of this test by the court of appeals.

noted in *United States* v. *Maher, supra,* fairness.[43]

One expression of this basic distaste for retroactive lawmaking has been the general rule that ambiguous statutes are presumed, in the absence of contrary intent, to operate prospectively only. "Retroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co.* v. *Comm'r,* 323 U.S. 141, 164 (1944). *See also Hassett* v. *Welch,* 303 U.S. 303, 314 (1938), where this Court said that settled rules of statutory construction "teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively . . ." The court of appeals would reverse this presumption against retroactive application of legislation. It would require retroactivity without any statutory mandate whatever, in the absence of a showing in support of non-retroactivity which it deems compelling. In effect, the court below created a presumption in favor of retroactivity which, it concluded, the Commission failed to overcome.

B. Retroactivity Has Not Been Required For The Validity Of Rulemaking, Legislation Or Judicial Action.

The novel and unsupported position of the court of appeals that prospective-only rulemaking is irrational and therefore invalid contravenes past precedents in regard not only to the Commission's actions, and those of other administrative agencies, but also in

[43] "Retrospective laws are, indeed, generally unjust; and as has been forcibly said, neither accord with sound legislation nor with fundamental principles of the social compact." Story, *Constitution,* § 1398 (1898). In the area of criminal laws, this principle is so fundamental that the Constitution, Art. I, § 9, cl. 3, prohibits the making of *ex post facto* laws. *See Calder* v. *Bull,* 3 Dall. 386 (1798).

regard to the Congress, state courts, and indeed this Court.

1. *Prospective-only Commission Rules.*

Not only is prospective-only application of Commission regulations commonplace,[44] but also such prospective-only applications of Commission regulations

[44] In changing policies, previously approved non-conforming arrangements have frequently been grandfathered by the Commission. Other distinctions between prospective and retroactive applications of Commission regulations have frequently been made. *See, e.g., Revision of FM Broadcast Rules,* 40 F.C.C. 660, ¶¶ 91-100 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); *Distribution of Television Broadcast Signals by CATV Systems,* 2 F.C.C.2d 725, 784 (1966) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); *Cable Television Report and Order,* 36 F.C.C.2d 143, 185 (1972) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems); *Telephone Terminal Equipment Rules,* 59 F.C.C.2d 83 (1976) (certain types of terminal equipment grandfathered under registration program).

The Commission has made similar distinctions in regard to new rules to promote diversification of ownership. *See, e.g., Multiple Ownership of Standard, FM, and Television Broadcast Stations,* 45 F.C.C. 1476 (1964); *Hearings on Application for Second VHF Station,* 3 P&F Radio Reg. 2d 909 (1964); *Interim Policy on Television Multiple Ownership,* 5 P&F Radio Reg. 2d 271 (1965); *Multiple Ownership of Television Broadcast Stations,* 12 P&F Radio Reg. 2d 1501, 1507 (1968); *Multiple Ownership of Standard, FM & TV Broadcast Stations,* 22 F.C.C.2d 306 (1970); *Multiple Ownership Rules,* Docket 20548, 63 F.C.C. 2d 824 (1977).

The Commission also adopted a rule essentially identical to the one at issue here in regard to cable television and television cross-ownership. *CATV-TV Cross-Ownership Rules,* 55 F.C.C.2d 540 (1975), *reconsideration denied,* 58 F.C.C.2d 596 (1976), *appeal pending,* No. 75-1933, *et al.* (D.C. Cir. 1975), *motions for partial stay granted,* June 10, 1977.

have been frequently upheld by the courts without any equation of prospectivity with irrationality.[45]

2. *Prospective-only Rules By Other Agencies.*

In regard to other agencies, prohibition of—rather than requirement of—retroactive application of new agency rules has been mandated by the courts in recognition of the potential for unfairness inherent in retroactive rules. *See, e.g., Retail, Wholesale and Dep't Store Union* v. *NLRB,* 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB* v. *E&B Brewing Co.,* 276 F.2d 594, 600 (6th Cir. 1960); *Maceren* v. *District Director, Immigration & Naturalization Service,* 509 F.2d 934, 940

[45] Commission regulations involving prospective-only application or "grandfathering" have been upheld in the following cases:

National Broadcasting Co. v. *United States, supra,* 319 U.S. at 207 (prohibition of ownership of two stations in the same area by one network and network ownership of stations in communities with so few stations or unequal coverage that competition would be restricted was upheld without requiring divestiture of all such network-owned stations);

United States v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956) (Multiple Ownership Rules prohibiting granting of new licenses to owners of 7 AM, 5 FM and 5 TV stations upheld without requirement of divestiture, even though the rules were designed to "avoid overconcentration of broadcasting facilities." *Id.,* at 193.);

Committee for Open Media v. *FCC,* 533 F.2d 1 (D.C. Cir. 1976) (grant of grandfather status to cable television system with fewer than 50 subscribers at effective date of Commission regulation requiring cable television systems to have a certificate of compliance upheld);

Columbus Broadcasting Coalition v. *FCC,* 505 F.2d 320, 324 (D.C. Cir. 1974) (implicit approval of grandfathering interests which did not conform to "one to a market rule," *Multiple Ownership of Standard, FM and TV Broadcast Stations,* 22 F.C.C. 2d 306 (1970);

Buckeye Cablevision, Inc. v. *FCC,* 387 F.2d 220 (D.C. Cir. 1967) (grandfathering cable television system importation of

(9th Cir. 1974). *Cf. NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860-861 (2d Cir. 1966). Indeed, this Court has expressly held that an agency may use its adjudicatory powers to promulgate requirements that are purely prospective in effect. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969);[46] *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

3. *Prospective-only Legislation.*

As discussed above, legislation, the functional and legal parent of rulemaking, can take a prospective course, and, indeed, in the absence of contrary intent, is deemed not to admit of a retroactive effect. Prospectivity in legislation is not equated with irrationality.

4. *Prospective-only Holdings By This and Other Courts.*

This Court has held that state courts need not give their decisions retroactive effect in other cases. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). State courts have frequently overruled decisions by prospective-only application of their holdings.[47] It seems rather difficult to sustain the

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distant signals permissible in order to avoid unnecessary disruption of viewing habits);

Jefferson Standard Broadcasting Co. v. *FCC*, 297 F. Supp. 784, 785 (W.D.N.C. 1969) (recognition of grandfathering in regard to prohibition of improvement of broadcast television signals under common ownership).

[46] One comment has suggested, in analyzing this case, that "the vesting of rulemaking power in agencies suggests that Congress was willing to have them act prospectively in general." "The Supreme Court, 1968 Term," 83 Harv. L. Rev. 62, 224 (1969).

[47] State court prospective overrulings have dealt with a number of legal principles with substantial consequences. Among these are governmental tort immunity, *see, e.g., Dawson* v. *Olsen*, 94 Idaho 636, 496 P.2d 97 (1972); *Molitor* v. *Kaneland Community Unit Dist. No. 302*, 18 Ill.2d 11, 163 N.E.2d 89 (1959); charitable tort immunity, *see, e.g., Burns* v. *Owens*, 459 S.W.2d 303 (Mo. 1970); *Parker* v. *Port Huron Hospital*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Kojis* v. *Doctors Hospital*, 12 Wis.2d 367, 107 N.W.2d 131, *modified on rehearing*, 107 N.W.2d 193 (1963); intra-family tort immunity, *see, e.g., Vickers* v. *Vickers*, 109 N.H. 169, 242 A.2d 57 (1968); *Schwartz* v. *U.S. Rubber Corp.*, 112 N.J. Super. 595, 272 A.2d 310 (1971); *Fountain* v. *Fountain*, 214 Va. 347, 200 S.E.2d 513 (1973), *cert. denied*, 416 U.S. 939, *rehearing denied*, 417 U.S. 927 (1974); *Balts* v. *Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Goller* v. *White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963); and allocation of income between life tenant and remainderman, *see, e.g., Langdell* v. *Dodge*, 100 N.H. 118, 122 A.2d 529 (1956). For other examples of state court prospective-only rulings, *see Comment Note*, "Prospective or Retroactive Operation of Overruling Decision," 10 A.L.R. 3d 1371 (1966).

See also Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 N.Y.U. L. Rev. 631 (1967).

suggestion that this Court's decision, by failing to require retroactivity, was irrational.[48]

This Court, in civil as well as in criminal litigation, has held that its decisions can be applied prospectively.[49] For example, in *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969), the Court, in order to avoid "injustice or hardship," applied prospectively only its decision that a state law providing that only "property

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[48] *See also Action for Children's Television* v. *FCC*, Case No. 74-2006 (D.C. Cir., July 1, 1977), in which one panel of the court of appeals refused to apply another decision of the court retroactively.

[49] *See* Beytagh, "Ten Years of Non-Retroactivity: A Critique and a Proposal," 61 Va. L. Rev. 1577 (1975) for a thorough discussion of this subject. Dean Beytagh distinguishes between (1) "pure prospectivity," decisions which govern "only future cases and [apply to] neither the parties before the court nor any previous or pending cases," (2) "non-retroactivity," or decisions which govern "future cases as well as litigants at bar but not previous or pending cases," and (3) "retroactivity" or decisions which govern

taxpayers'' could vote in elections called to approve issuance of bonds by a municipal utility system was invalid under the Fourteenth Amendment. Similarly, in *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 213-215 (1970), the Court applied prospectively its decision that a state could not restrict to real property taxpayers the vote to approve general obligation bonds, on the ground that giving retroactive effect to its decision would be "unjustifiably disruptive." *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 422 (1964), involved the prospective-only application of a decision in regard to the presentation of federal claims in a state court after an abstention order of a federal court. *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 572 (1969), involved the prospective-only application of a decision interpreting the application of Section 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973 *et seq.* (1964 ed., Supp. I), and refusing to invalidate elections challenged pursuant to this section. *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 105-107 (1971), where the Court thoroughly discussed the principles of non-retroactivity, involved a decision not to apply retroactively a state one year statute of limitations in personal injury actions. *Cf. Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 496 (1968); *United States* v. *Estate of Donnelly,* 397 U.S. 286, 295 (1970); *Simpson* v. *Union Oil Co.,* 377 U.S. 13, 25 (1964); *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940); *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973).

Cases in which the Court refused to apply its decisions in criminal matters retroactively are perhaps

"future cases, the present litigants, and all fact situations arising before the date of the law-changing decision that are reviewable either by direct appeal or by collateral attack." *Id.,* at 1157, n. 2.

better known, and certainly more numerous. This Court held that embezzled funds were income, but limited that holding to prospective effect only. *James* v. *United States,* 366 U.S. 213 (1961). Among the Court's other decisions in the criminal area are: *Linkletter* v. *Walker,* 381 U.S. 618 (1965);[50] *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406 (1966);[51] *Johnson* v. *New Jersey,* 384 U.S. 719 (1966);[52] *Stovall* v. *Denno,* 388 U.S. 293 (1967);[53] *Desist* v. *United States,* 394 U.S. 244 (1969);[54] *Halliday* v. *United States,* 394 U.S. 831 (1969);[55] *Williams* v. *United States,* 401 U.S. 646 (1971);[56] *Mackey* v. *United States,* 401 U.S. 667

[50] Exclusionary rule announced in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), held inapplicable to cases in which convictions had become final before the date *Mapp* was announced. The Court noted also that the rule of non-retroactivity could be applied in constitutional as well as non-constitutional cases, *Linkletter* v. *Walker, supra,* 381 U.S. at 628, and that "the Constitution neither prohibits nor requires retroactive effect." *Id.* at 629.

[51] Prohibition of prosecutor's comment on defendant's failure to testify, announced in *Griffin* v. *California,* 380 U.S. 609 (1965), not applied retroactively.

[52] Rules about self-incrimination announced in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), not applied retroactively. *See also Jenkins* v. *Delaware,* 395 U.S. 213 (1969).

[53] Requirements of counsel in regard to pretrial line-ups, announced in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Gilbert* v. *California,* 388 U.S. 263 (1967), not applied retroactively.

[54] Rule that physical trespass need not be shown to establish Fourth Amendment search-and-seizure violation, announced in *Katz* v. *United States,* 389 U.S. 347 (1967), not applied retroactively. *See also Michigan* v. *Tucker,* 417 U.S. 433 (1974).

[55] This decision, construing Rule 11 of the Federal Rules of Criminal Procedure concerning guilty pleas, held non-retroactive.

[56] Rules in regard to search-and-seizure, enunciated in *Chimel* v. *California,* 395 U.S. 752 (1969), held non-retroactive.

(1971);[57] *Adams* v. *Illinois,* 405 U.S. 278 (1972);[58] *Michigan* v. *Payne,* 412 U.S. 47 (1973);[59] *Gosa* v. *Mayden,* 413 U.S. 665 (1973);[60] *Daniel* v. *Louisiana,* 420 U.S. 31 (1975);[61] *United States* v. *Peltier,* 422 U.S. 531 (1975).[62] Recently the Court decided that the *Miller*[63] definition of obscenity could not constitutionally be applied retroactively against the interest of an accused. *Marks* v. *United States,* 430 U.S. 188 (1977).

As the Court noted in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106 (1971), ". . . in the last few decades, we have recognized the doctrine of non-retroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases." (Citations omitted.) The Court said, *id.,* at 106-107, that three separate factors guide its decisions:

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[57] Rules in regard to self-incrimination enunciated in *Marchetti* v. *United States,* 390 U.S. 39 (1968), and *Grosso* v. *United States,* 390 U.S. 62 (1968), held not retroactive.

[58] *Coleman* v. *Alabama,* 399 U.S. 1 (1970) requirement of counsel at pretrial hearing held non-retroactive.

[59] Resentencing rule enunciated in *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), held non-retroactive.

[60] Decision in *O'Callahan* v. *Parker,* 395 U.S. 258 (1969), that persons in armed forces are entitled to a civilian trial for non-service-connected offenses held non-retroactive.

[61] Decision in *Taylor* v. *Louisiana,* 419 U.S. 522 (1975), in regard to discrimination against women in jury service held non-retroactive.

[62] Decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), invalidating warrantless searches by border patrol agents acting without probable cause held non-retroactive. *Cf. Bowen* v. *United States,* 422 U.S. 916 (1975).

[63] *Miller* v. *California,* 413 U.S. 15 (1973) (setting new standards to isolate "hard-core pornography" from speech protected by the First Amendment.)

[1] "the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." (citations omitted);

[2] "it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'," *citing Linkletter* v. *Walker,* 381 U.S. 618, 629 (1965);

[3] "Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity'," *citing Cipriano* v. *City of Houma,* 395 U.S. 701, 706 (1969).

In reaching the conclusion that its new rule in regard to cross-ownership should be applied prospectively-only, except in certain limited circumstances, the Commission dealt with—and complied with—each of these guidelines. Its new rule did establish a "new principle" in that it overruled the past precedent of permitting and in many instances, encouraging cross-ownership. *See* discussion p. 13, *supra* and n. 19, *supra.* The Commission balanced the history, purpose and effect of prospective only application of the rule. (FCC App. B, pp. 93-98.) The Commission clearly was concerned not only with the potential inequitable results of applying its rule retroactively (FCC App.

B, p. 93), but also with its overall effect on the public interest.

Having followed each of the standards which this Court has set forth to guide its own decisions in regard to retroactivity, it cannot reasonably be contended that this decision of the Commission was irrational.

CONCLUSION

The decision of the court below amounts to usurping the administrative functions of the Commission. There is no basis, either legal or practical, for the court's conclusion that the Commission's determination to make its rule prospective-only except in limited circumstances was irrational. Accordingly, this Court should reverse the decision of the court of appeals.

Respectively submitted,

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No. 76-1471

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE TIMES MIRROR COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER FEDERAL COMMUNICATIONS COMMISSION

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
STATEMENT	3
The Commission's Decision	3
The Court of Appeals' Decision	9
ARGUMENT	10
I. The Court's Reversal of the Commission on the Question of Divestiture Exceeded the Proper Scope of the Court's Reviewing Authority	11
A. The Court Applied An Incorrect and Inconsistent Standard of Review to the Divestiture Question	11
B. The Commission's Decision Not To Require General Divestiture Was Rationally Based and Well Within Its Authority	13
1. The Commission Rationally Weighed the Public Interest Consequences of Divestiture	13
2. The Commission Was Not Legally Required to Depart From Its Normal Practice of Regulating Industry Ownership Patterns Prospectively	17
II. In Purporting to Deprive the Commission of All Discretion to Consider Alternative Courses of Action on Remand, the Court of Appeals Exceeded its Authority as a Reviewing Court	21
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Associated Industries v. *Department of Labor*, 487 F.2d 342 (2d Cir. 1973) 14
Associated Press v. *United States*, 326 U.S. 1 (1945) 4
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) 11, 13
California Citizens Band Ass'n v. *United States*, 375 F.2d 43 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967) 13
Camp v. *Pitts*, 411 U.S. 138 (1973) 13
Carroll Broadcasting v. *FCC*, 258 F.2d 440 (D.C. Cir. 1958) 17
Citizens Communications Center v. *Federal Communications Commission*, 447 F.2d 1201 (D.C. Cir. 1971) 6, 9, 14, 16
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 11,13
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 11, 21, 22
FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) 21
Geduldig v. *Aiello*, 417 U.S. 484 (1974) 20
Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) 6, 16
Home Box Office, Inc. v. *FCC*, D.C. Cir. No. 75-1280 (decided March 25, 1977), *cert. denied*, No. 76-1724, October 3, 1977, *petition for rehearing pending* 13
Jefferson v. *Hackney*, 406 U.S. 535 (1972) 20
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 4, 11, 21
National Nutritional Foods Ass'n v. *Weinberger*, 512 F.2d 688 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975) 13-14
NLRB v. *Food Store Employees Union*, 417 U.S. 1 (1974) 21, 22
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 11

TABLE OF AUTHORITIES—Continued

Page

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 20
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 11
Udall v. *Tallman*, 380 U.S. 1 (1965) 11
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) 13, 15
United States v. *Saskatchewan Minerals*, 385 U.S. 94 (1966) 21
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 4, 11, 13
Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) 20

Statutes:

Administrative Procedure Act

Section 4, 5 U.S.C. § 553 13
Section 7, 5 U.S.C. § 556 13
Section 8, 5 U.S.C. § 557 13
5 U.S.C. § 706(2)(A) 11, 12
5 U.S.C. § 706(2)(E) 13

Communications Act of 1934, *as amended*, 47 U.S.C. § 151 *et seq.* 9

47 U.S.C. § 154(i) 11
47 U.S.C. § 301 16
47 U.S.C. § 303(r) 11, 13
47 U.S.C. § 307(a) 11
47 U.S.C. § 309(a) 11

FCC Authorities:

Anthony Wayne Broadcasting, 19 F.C.C. 383 (1954), *remanded sub nom. Fleming* v. *FCC*, 225 F.2d 523 (1955) 20
Cable Television Report and Order, 36 F.C.C.2d 143 (1972) 18

TABLE OF AUTHORITIES—Continued

	Page
Carolinas Advertising, Inc., 42 F.C.C.2d 1027 (1973)	20
Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725 (1966)	19
Diversification of Control of CATV Systems, 23 F.C.C.2d 833 (1970)	19
FCC 1945 Annual Report	4
Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 40 P&F Radio Reg.2d 763 (1977), *petition for review pending sub nom. National Black Media Coalition, et al.* v. *FCC*, D.C. Cir. No. 77-1500	16
FM Broadcasting Rules, 23 P&F Radio Reg. 1801 (1962)	
Further Notice of Proposed Rulemaking, 22 F.C.C.2d 339 (1970)	5
Hearings on Applications for Second VHF Station, 3 P&F Radio Reg.2d 909 (1964)	4, 18
Hearst Radio, Inc. (WBAL), 15 F.C.C. 1149 (1951)	16
Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg.2d 271 (1965)	4, 18
Legal Opinion of FCC General Counsel to the Senate Interstate Commerce Committee, filed January 25, 1937	6
Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288 (1953)	19
Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964)	4, 18
Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306 (1970), *as modified*, 28 F.C.C.2d 662 (1971)	5, 6, 18
Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg.2d 1501 (1968)	4, 18

TABLE OF AUTHORITIES—Continued

	Page
Newspaper Ownership of Radio Stations (Notice of Dismissal of Proceedings), 9 Fed. Reg. 702 (1944)	5
Order No. 79 & 79-A, 6 Fed. Reg. 1580, 3302 (1940)	5
Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970)	16
Policy Statement on Comparative Broadcasting Hearings, 1 F.C.C.2d 393 (1965)	5, 6, 9, 10
Report on Chain Broadcasting (Order No. 37, Dkt. No. 5060) (1941)	19
Revision of FM Broadcast Rules, 23 P&F Radio Reg. 1801 (1962)	18
Miscellaneous:	
K. Davis, Administrative Law of the Seventies (1976)	11
H.R. Rep. No. 2095, 78th Cong., 2d Sess. (1945)	6
S. Rep. No. 741, 81st Cong., 1st Sess. (1949)	6
Supreme Court Rule 42(2)	1

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE TIMES MIRROR COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER FEDERAL COMMUNICATIONS COMMISSION

INTEREST OF AMICUS CURIAE [1]

The Times Mirror Company ("Times Mirror"), through its subsidiary The Times Herald Printing Company, publishes *The Dallas Times-Herald*, a daily news-

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[1] Pursuant to Rule 42(2) of the Rules of this Court, Times Mirror has obtained the written consent of all the parties to the case to its filing of this brief as *amicus curiae*. The written consents are on file with the Clerk of this Court.

paper of general circulation in Dallas, Texas.[2] Times Mirror also owns all the outstanding stock of KDFW-TV, Inc., licensee of station KDFW-TV, one of six television stations serving the Dallas-Fort Worth area.[3]

In 1975 the Federal Communications Commission (the "Commission") adopted rules forbidding the issuance of new licenses for broadcast stations (either television or radio) to the owner of a daily newspaper of general circulation located in the same community as the broadcast station. The Commission determined not to apply the cross-ownership ban retroactively to existing co-located combinations, except in small markets in which one owner had virtually an absolute monopoly of communications voices. The decision of the court of appeals under review herein upheld the prospective portion of the rules but invalidated the Commission's decision not to apply the cross-ownership ban retroactively.

If permitted to stand, the court of appeals' decision will have a substantial adverse effect on Times Mirror by forcing it to divest either its newspaper or its broadcast station in Dallas-Fort Worth, unless it could obtain a waiver of the rule from the Commission upon a showing of special circumstances.[4] The Commission rule would

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[2] The *Times Herald* competes in the Dallas-Ft. Worth area with the other daily Dallas metropolitan newspaper, *The Dallas Morning News*, with the *Ft. Worth Star-Telegram*, and with a number of suburban newspapers.

[3] KDFW-TV competes with four other commercial television stations. Two of these are network affiliated VHF stations, one is an independent VHF station, and one is an independent UHF station. Dallas-Ft. Worth also is served by a noncommercial VHF station.

[4] The waiver standard adopted by the Commission (J.A. 211-12, ¶ 119), and approved by the court of appeals (J.A. 431 n. 112), is very strict, particularly as applied to a large market such as Dallas-Fort Worth. While a temporary inability to sell the newspaper or the station in an orderly market might justify a short duration

have permitted Times Mirror to retain both its Dallas-Fort Worth newspaper and television station, so long as the station continued to serve the public interest.

As the parties to this litigation have demonstrated, the court of appeals' decision would require a massive rearrangement of the pattern of ownership of this country's newspapers and television stations, especially in major metropolitan areas. This brief limits its discussion to two fundamental errors in that decision, each of which requires reversal of the judgment below:

First, the court of appeals transgressed the proper limits of the judicial role in reviewing agency action, by substituting its own balancing of the public interest for that of the Commission on the question whether divestiture of existing cross-ownerships of newspapers and broadcast stations should be required in communities which already have diversity in communications voices.

Second, even assuming there were no rational basis for the Commission's decision not to require general divestiture, the court of appeals erred nonetheless in ordering the Commission on remand to adopt a comprehensive divestiture rule, without allowing the Commission to exercise the normal discretion of an administrative agency to make a new determination in light of the court's decision.

STATEMENT

The Commission's Decision

The Commission has long been concerned that over-concentration of ownership of mass communications media

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waiver, a permanent waiver will be granted only in very limited circumstances, if the owner can show that the community cannot support separate ownership and operation of the newspaper and the station, or that presentation of diverse views to the community would be better served by continuation of the present combination. J.A. 211-12, ¶ 119.

might adversely affect the public's interest in receiving information from "diverse and antagonistic sources." *See Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). As the broadcast industry has matured and the Commission has acquired expertise in its regulation, the Commission has moved steadily to attempt to reduce concentration by general rules, in the hope that diversification of ownership will stimulate presentation of a variety of views. The process has been gradual and evolutionary, with new restrictions imposed on a step-by-step basis.

As early as 1941, the Commission enacted regulations which prohibited any organization from operating more than one broadcast network. *See National Broadcasting Co.* v. *United States*, 319 U.S. 190, 207-08 (1943). It also prohibited any person from controlling two or more stations of the same class (AM or FM) in the same service area. J.A. 193-94, ¶ 105. *See* 1945 FCC Annual Report at 2. In 1953, the Commission adopted a rule which limited the number of radio and television operating licenses which any one licensee could hold. *See United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). And in 1964, the Commission adopted policies designed to prohibit overlapping service contours and regulate concentration of ownership in the top 50 markets.[5]

In keeping with this evolutionary process, the Commission in 1968 announced proposed rules proscribing common ownership of broadcast stations providing different broadcasting services (TV-AM, TV-FM or AM-FM) in the same market (J.A. 135, ¶ 2). In 1970, the Commission adopted final rules (modified in 1971) which

[5] Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964); Hearings on Applications for Second VHF Station, 3 P&F Radio Reg.2d 909 (1964); Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg.2d 271 (1965); Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg.2d 1501 (1968).

prospectively prohibited common ownership of VHF television stations and any radio stations in the same market, permitted common ownership of AM-FM stations, and provided that applications involving common ownership of UHF television stations and radio stations would be considered on a case-by-case basis. Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306, *as modified*, 28 F.C.C. 2d 622 (1971) (J.A. 135-36, ¶ 3). The rules did not require divestiture of existing combinations but provided that the owner of a VHF station and a radio station in the same community could not thereafter sell both stations to the same person (*id.*). Simultaneously, the Commission published a *Further Notice of Proposed Rulemaking*, 22 F.C.C.2d 339, which invited public comments on a proposal, *inter alia*, to require divestiture, within five years, to reduce any one person's holdings in any market to one or more daily newspapers or one television broadcast station (J.A. 136, ¶ 4). The ensuing rulemaking led to this litigation.

This proceeding was not the Commission's first inquiry into the potential problems of newspaper and broadcast station cross-ownership. In the 1940s, the Commission conducted a thorough investigation of the field and decided to control cross-ownership questions on a case-by-case basis rather than by regulation. Orders No. 79 & 79-A, 6 Fed. Reg. 1580, 3302 (1940); Newspaper Ownership of Radio Stations (Notice of Dismissal of Proceedings), 9 Fed. Reg. 702 (1944) (J.A. 350, n.6). As the number of qualified license applicants grew, the Commission came, in choosing among competing candidates for the limited number of new stations, to prefer persons who did not own local newspapers, on the assumption that they were more likely to add to the diversity of viewpoints expressed in local media. *See Policy Statement on Comparative Broadcasting Hearings*, 1 F.C.C.2d 393, 394-95 (1965); J.A. 351-52 n.9. However, by its terms this pol-

icy did not affect the renewal of existing licenses.[6] The Commission has consistently renewed broadcast licenses held by newspaper owners if the licensee had not abused its common ownership and the station's performance otherwise served the public interest. Indeed, it has been clear from the outset that the Communications Act does not bar owners of newspapers from being licensees of broadcast stations (J.A. 192, ¶ 102).[7]

The instant rulemaking required almost five years to complete and generated a voluminous record. Based upon review of that record and its prior experience with cross-ownership problems, the Commission adopted a tripartite approach designed to regulate the speed of further diversification in the public interest. As in the First Report and Order, the Commission prohibited the formation of any new cross-ownerships in the future and required that existing combinations be dissolved in any future sale (J.A. 191, 192, ¶¶ 101, 103). It permitted existing cross-

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[6] 1 F.C.C.2d at 393 n.1; *see Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1207 (D.C. Cir. 1971); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[7] The question of newspaper-broadcast cross-ownership is also not unknown to the Congress, although it has never enacted legislation on the subject. Congress first inquired about the Commission's position as to newspaper cross-ownership in January 1937. *See* Legal Opinion of FCC General Counsel to the Senate Interstate Commerce Committee, filed Jan. 25, 1937 (*see* J.A. 445, 449). In 1945, the House Select Committee to Investigate the FCC discussed the results of the Commission's prior cross-ownership investigation. H.R. Rep. No. 2095, 78th Cong., 2d Sess. 17 (1945). In the late 1940s and early 1950s, Congress considered several bills which would have expressly prohibited the Commission from discriminating against newspapers in the granting of broadcast licenses. But Congress decided to forego action when testimony on behalf of the Commission persuaded it that legislation was unnecessary. *See* S. Rep. No. 741, 81st Cong., 1st Sess. 2 (1949). The problems of newspaper cross-owners also were aired to an extent in 1970-71, when Congress briefly contemplated legislation to reverse the decision in the *Greater Boston Television* case, *supra*, n.6.

ownerships to continue in communities which already enjoyed diversity of expression (J.A. 200-03, ¶¶ 112, 114). But in communities in which the Commission considered that an effective monopoly of communication existed, *i.e.*, one person owned both the only television station and the only newspaper, it ordered divestiture of one of the two media holdings within five years (J.A. 203-07, ¶¶ 112-114).

The Commission's decision was carefully tailored to accommodate the conflicting public interest considerations which emerged as it considered various aspects of the cross-ownership problem. In determining what the public interest required, the Commission's "primary concern [was] diversity in programming service . . ." (J.A. 200, ¶ 112). But it recognized that diversity "is not the only point to consider" and that "a number of [adverse] public interest consequences" would result from undue emphasis on that "abstract goal alone" (J.A. 197, ¶ 108).

Although the Commission found no pattern of misuse of commonly-owned media by newspaper cross-owners, it had little hesitation in adopting a prospective ban on formation of new combinations, because of the absence of countervailing public interest concerns (J.A. 191, 203, ¶¶ 101, 112). By the nature of a prospective ban, all affected parties are placed on notice and can plan accordingly. Thus, even though the Commission saw no urgent need for such action, it concluded that "[s]ince diversity can be fostered through prospective rules without the fundamental disruption that would occur with altering all current ownership patterns, even a [small] gain [in diversity] is worth pursuing" (J.A. 193, ¶ 104).

Relying in part on its finding that newspaper owners of broadcast stations have proved as a class to be exceptionally responsible licensees (J.A. 197-98, ¶ 109), the Commission decided to reject a policy of across-the-board divestiture for existing combinations. The Commission

found that, unlike a prospective rule, retrospective divestiture "introduces the possibility of disruption for the industry" and "losses or diminution of service to the public" (J.A. 198, 201-02, ¶¶ 109, 112). The Commission therefore concluded that "a mere hoped for gain in diversity" could not justify risking the occurrence of the potential adverse consequences (J.A. 198, ¶ 109; *see* J.A. 199, ¶ 110):

> There are a number of public interest consequences which form the basis of our concern. Requiring divestiture could reduce local ownership as well as the involvement of owners in management as many sales would have to be outside interests. The continuity of operation would be broken as the new owner would lack the long knowledge of the community and would have to begin raw. Local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too. None of these points was given consideration when we spoke in more sweeping terms at an earlier stage of this proceeding (J.A. 197, ¶ 108).

Accordingly, the Commission decided to compel divestiture of existing combinations only in markets where it appeared from the ownership structure that there was an absence of "real community-wide diversity on vital issues of local concern" (J.A. 203, ¶ 112). The Commission identified 16 communities in which the newspaper cross-owners faced no independently-owned mass media competition and thus enjoyed "an effective monopoly in the marketplace of ideas as well as economically" (*id.*). While characterizing divestiture as "a harsh remedy, one to be reserved only where [*sic*] the need is overwhelming and the evidence unambiguous," the Commission nevertheless concluded that existing combinations had to be dismantled in the "egregious cases" where there was no "effective juxtaposing of views" (J.A. 207, ¶ 114).

The Court of Appeals' Decision

The court of appeals acknowledged that the record was "essentially inconclusive" as to any negative effects on the public interest from existing newspaper-broadcast cross-ownership (J.A. 414) and that the Commission had based its divestiture decision "primarily on policy, not factual considerations" (J.A. 396 (footnote omitted)). The court found that the prospective ban on new combinations was rationally based on the Commission's diversification policy. While conceding that it was speculative whether broadening of ownership would actually increase diversity of speech, the court found that this uncertainty did not render the Commission's effort irrational (J.A. 373; *see id.* 426-27).

In reviewing the Commission's decision to grandfather existing combinations which did not enjoy a local monopoly, the court evaluated the policies and record presented on review and held "that the Commission erred in concluding that the other policies it advanced required it to find evidence of harm [from existing combinations] before ordering divestiture" (*id.* 415-16). The court found that the Communications Act of 1934, *as amended*, 47 U.S.C. § 151 *et seq.* (the "Communications Act"), the policies associated with the First Amendment, and the Commission's own diversification policy required a "presumption" in favor of divestiture absent a concrete factual showing of actual harm to the public interest (*id.* 415-18).* The court then considered and rejected

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* The court extracted this "presumption" almost entirely from the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (*see* J.A. 418 & n.93, *citing* J.A. 351-53 n.9.) This reliance on the 1965 Policy Statement overlooks the facts that (a) the function of the policy statement was to provide standards for selecting among *new applicants*, and it was expressly made inapplicable (and has never been applied, except as a guide to introduction of evidence) to cases involving incumbent licensees (1 F.C.C.2d at 393 n.1; *Citizens Communications Center* v. *FCC*, *supra*, 447 F.2d at 1208-09 n.23); (b) the Policy Statement provides cri-

each of the countervailing policies the Commission found important, dismissing them as "lesser policies, lacking support in the record" (*id.* 427). The court held that the Commission could not "rationally" have concluded that these competing policies justified grandfathering "absent a showing of actual harm" (J.A. 426).

On the basis of this holding, the court vacated the grandfather rule and remanded the record to the Commission for "adoption of a rule not inconsistent with" the court's conclusion "that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest" (J.A. 431).

ARGUMENT

The court of appeals' decision raises two principal issues which this brief will address: First, whether the court usurped the power delegated by Congress to the Commission in determining that conflicting public policies required general divestiture of co-located newspaper-broadcast combinations. Second, whether in any event the court exceeded its authority by remanding with instructions affording the Commission no alternative but to adopt rules requiring general divestiture.

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teria for making a comparative assessment, by hearing, of known applicants for a specific facility, and does not necessarily serve as an adequate guide, much less support a controlling "presumption," for comprehensive resolution of public interest questions in a rule-making of nationwide scope involving stations in hundreds of diverse markets; and (c) in any event, far from making media diversity a paramount consideration, the Policy Statement specifies the "first" goal of licensing proceedings to be obtaining "the best practicable service to the public," while "maximum diffusion of control of the media of mass communications" is relegated to the "second" objective. *See* 1 F.C.C.2d at 394.

I. The Court's Reversal of the Commission on the Question of Divestiture Exceeded the Proper Scope of the Court's Reviewing Authority

A. *The Court Applied An Incorrect and Inconsistent Standard of Review to the Divestiture Question.*

Under the Communications Act, Congress delegated to the Commission the legislative responsibility for giving content to the statutory standard that issuance of broadcast licenses shall serve the public convenience, interest or necessity.[9] The role of the courts in the substance of such legislative policy judgments is only "to correct errors of law" which the Commission may have made in reaching or articulating its judgment. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); K. Davis, *Administrative Law of the Seventies*, § 29.01 (1976).

Thus, in reviewing a Commission rulemaking, the court of appeals properly may determine only whether the agency's action was rational and based on a consideration of the relevant factors. Section 10(e)(B)(1) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974). "The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe, supra*, 401 U.S. at 416. Especially where, as in the instant case, the agency's decision is based on an assessment of competing public policy considerations, its judgment is "entitled to the greatest amount of weight by appellate courts." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947). *See Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968); *see generally Udall* v. *Tallman*, 380 U.S. 1 (1965).

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[9] *See* 47 U.S.C. §§ 303(r), 307(a); *see also id.*, §§ 154(i), 309(a); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

The court of appeals' eagerness to impose its own policy views on the final outcome of the Commission's rulemaking proceeding is sharply reflected in the court's discussion of the applicable standard of judicial review. As to the prospective ban on cross-ownerships, with which the court quite evidently agreed, the court was content to apply restrainedly the traditional standards applicable to informal rulemaking—namely, whether the Commission's determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and whether it had a "rational basis" (J.A. 364-65; *see id.* 365-74). As to the Commission's grandfathering determination, on the other hand, the court stated that, while "technically" there is "no requirement that the rules be based on substantial evidence," nevertheless this aspect of the Commission's decision must be "supported by the record" (J.A. 394-95).

The court, recognizing the inconsistency, attempted to justify it solely by the suggestion that the Commission's decision on divestiture was somehow more "factual" and thus less policymaking in nature than the determination to adopt a prospective ban:

> With respect to the prospective rules, which reflect a legislative type policy judgment, *as opposed to the retroactive rules*, which purport to be based also on factual considerations, our primary task will be to determine that the regulations are not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" (J.A. 364-65) (emphasis added).

But in fact, the Commission's decision on divestiture was every bit as much a "legislative type policy judgment" as its adoption of prospective rules. Indeed, the court appeared to acknowledge this elsewhere in its opinion, stating that the Commission's decision against divestiture rested "primarily on policy, not factual considerations"

(J.A. 396).[10] In substituting its own views for those of the Commission on that policy judgment, the court clearly transgressed the bounds of its authority as a reviewing court.

B. *The Commission's Decision Not to Require General Divestiture Was Rationally Based And Well Within Its Authority.*

1. The Commission Rationally Weighed the Public Interest Consequences of Divestiture.

The Commission's decision to grandfather existing cross-ownerships in all but monopoly situations reflected a

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[10] If the court meant to suggest that the Commission's error lay in not basing its divestiture decision on a factual record of "hard" evidence, the court was not only being inconsistent with its treatment of the Commission's authority to adopt prospective rules, but it also misapprehended the procedural requirements applicable to the Commission proceeding and the nature of the court's review authority. Commission rulemaking under Section 303(r) of the Communications Act, 47 U.S.C. § 303(r), is informal rulemaking subject to Section 4 of the APA, 5 U.S.C. § 553, rather than adjudication or formal rulemaking governed by Sections 7 and 8, 5 U.S.C. §§ 556, 557. *California Citizens Band Ass'n* v. *United States*, 375 F.2d 43, 53-54 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967). Indeed, this Court long ago recognized the flexibility of informal rulemaking, as opposed to the rigidities of hearing—type proceedings, as one of the main justifications for use of such rulemaking to deal with industry-wide policy issues such as those involved in this case. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

In reviewing rulemaking such as that involved here, the court's function is not to "weigh the evidence introduced before the Commission," just as it is "not to inquire into the wisdom of the regulations" nor to inquire into the "soundness of the reasoning by which the Commission reaches its conclusions . . . [except] to ascertain that . . . [they] are rationally supported." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972); *cf. Camp* v. *Pitts*, 411 U.S. 138, 140-41 (1973); *see* 5 U.S.C. § 706(2)(E); *see also Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 415-16. This case is illustrative of an unfortunate tendency of some courts in recent years to apply a more intrusive standard of review to agency rulemaking and, in particular, to insist on formal record support for what are essentially legislative judgments in informal rulemaking. *See, e.g., Home Box Office, Inc.* v. *FCC*, D.C. Cir. No. 75-1280 (decided March 25, 1977), *cert. denied*, No. 76-1724, October 3, 1977, *petition for rehearing pending; National Nutritional Foods*

rational balancing of the conflicting public interest concerns. The Commission identified three adverse effects on the public interest that would result from forced divestiture: Loss of continuity of service by newspaper cross-owners as a group; loss of local ownership and operation; and potentially adverse economic consequences affecting the quality of programming. The Commission's opinion provides a reasoned path from these findings to its ultimate judgment, in the application of its expertise, that the potential disruption from across-the-board divestiture outweighed the speculative, marginal gains that might result in communities which already enjoyed diversity of media voices.

One of the Commission's primary concerns was that divestiture would deprive the public of the benefits of the stability and continuity of service provided by the newspaper cross-owners (J.A. 197, ¶ 108). The Commission's concern is supported by "the unassailable premise" that the past performance of a broadcaster is the most reliable indicator of its future performance. *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1208 (D.C. Cir. 1971). The Commission found that newspaper cross-owners as a group have established "[t]raditions of service" in the public interest and have shown long-term continuity of ownership (J.A. 197-98, ¶ 109). The Commission thus had substantial assurances that newspaper owners would continue to provide a high level of public service in the future if divestiture were not ordered. But there could be no advance assurance that the licensees who would take their places after wholesale divestiture would render comparable services or demonstrate similar long-term commitment to broadcasting.[11]

Ass'n v. *Weinberger*, 512 F.2d 688, 701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975); *see id.* at 704-05 (concurring opinion); *Associated Industries* v. *Department of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) (dictum).

[11] While its holding is not entirely clear, the court of appeals appears to have quarreled with the Commission's evaluation of the record on this point and the weight to be attached to these facts (J.A. 396-402). On the basis of its own weighing of the evidence, the court of appeals seems to have concluded that the record was "inconclusive" as to the benefits of newspaper owners as broadcast licensees (J.A. 413-14; *see* J.A. 413 n. 88). For the reasons discussed above, we believe that this reweighing of the evidence was an usurpation of the Commission's authority. *See United States* v. *Allegheny-Ludlum Steel Corp., supra.*

Furthermore, even if the Commission could be assured that the new group of licensees would be comparable in all respects to the newspaper cross-owners, it was properly concerned that divestiture would nonetheless inflict a substantial and immediate blow to the public interest. Continuity of service enables a broadcaster to develop familiarity with the needs of his community and expertise in meeting those needs. New licensees presumably would lack expertise and would require substantial periods of time fully to implement even their own preconceived proposals for broadcast services. The public interest might suffer during the licensee's learning period, and this cumulative deficit could never be recouped even if the new licensee eventually attained or exceeded the former level of service.[12] The court of appeals' opinion suggests no reason why the Commission was required to ignore these problems in ascertaining the public interest.[13]

In this connection, the court's opinion takes issue with the notion that the Commission in considering di-

[12] The court's insistence that a "one-time alteration in the ownership structure of the broadcast industry should not effect the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity" (J.A. 422), wholly misses the point of this policy consideration, which focuses on the transition period.

[13] The court of appeals contended that it was irrational for the Commission to be concerned about disrupting continuity, since it routinely permits substantial license turnover by approving license assignments (J.A. 423). But the question whether the Commission should compel transfers by proven performers who desire to retain their licenses is a different question from whether the public interest is served by permitting transfers by licensees who have lost interest in rendering broadcast service.

vestiture could properly be concerned with the "legitimate renewal expectancies" of licensees, in reliance on existing policies. J.A. 422. The court correctly observed that the Communications Act negates any property right in use of the public airwaves, 47 U.S.C. § 301 (J.A. 422 & n.97). But to withhold such a property right is far from saying that there is no public interest in fulfilling the renewal expectations of qualified licensees. The Commission's policies have long given special recognition to the record of service of an incumbent licensee, in considering whether renewal of the existing license should be preferred to awarding it to a new applicant.[14] The court of appeals has acknowledged that recognition of "legitimate renewal expectancies" is "implicit in the structure of the [Communications] Act." *Greater Boston Television Corp.* v. *FCC*, *supra*, 444 F.2d at 854. And while the court of appeals has disagreed with one Commission attempt to formulate and implement this policy,[15] it nevertheless has recognized that "the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." *Citizens Communications Center* v. *FCC*, *supra*, 447 F.2d at 1213 n.35.

The Commission's second major concern was that the restructuring of the broadcast industry required by wholesale divestiture might lead to the sales of a significant number of stations to nonlocal interests (J.A. 197, ¶ 108). A great preponderance of existing newspaper cross-

[14] *See* Hearst Radio, Inc. (WBAL), 15 F.C.C. 1149 (1951); *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424 (1970); Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 40 P&F Radio Reg.2d 763, 776 (1977), *petition for review pending sub nom. National Black Media Coalition* v. *FCC*, D.C. Cir. No. 77-1500.

[15] In the 1970 *Policy Statement*, *supra*.

ownerships are locally owned (J.A. 420-21).[16] In the event of divestiture, many of these stations might be sold to outside interests, due to the mobility of investment capital. To the extent that local owners are more responsive to local programming needs because of their familiarity with and greater ties to the service area, forced license transfers would sacrifice their expertise, to the public detriment.

Finally, the Commission was concerned that widespread divestiture would cause economic dislocation by disrupting the equity capital markets and increasing the interest rates payable on the large sums of money necessary to finance the transfer of these stations (J.A. 197, ¶ 108). The court of appeals dismissed this policy consideration in part because it evidently believed that the Commission's concern was solely with the private equities of the newspaper cross-owners in a forced sale situation (J.A. 424 & n.101). But the economic consequences of divestiture upon the quality of programming were certainly a factor which the Commission could properly consider to have a bearing on the public interest. *Cf. Carroll Broadcasting Co.* v. *FCC*, 258 F.2d 440 (D.C.Cir. 1958).

2. The Commission Was Not Legally Required to Depart From Its Normal Practice of Regulating Industry Ownership Patterns Prospectively.

The court's disparagement of the Commission's concern with disruption of the broadcast industry blinded it to a fourth major policy serving the public interest which is inherent in the Commission's approach and which argued against divestiture. The Commission's long-standing evolutionary approach to fostering diversity of media in-

[16] Not all cross-ownerships, of course, involve local ownership. But the Commission was nonetheless clearly entitled to take into account the overall, nationwide loss of localized ownership which would result from general divestiture.

terests is itself an important component of the public interest. The Commission's aversion to seeking global solutions, and its preference for a step-by-step approach building upon the wisdom of experience, is a rational solution to the problem of maintaining stability and a continued high level of service in the broadcast industry while moving gradually and predictably to promote the goal of diversity.

The Commission's rejection of retroactive divestiture rules is an essential element of this evolutionary approach. As the Commission observed (J.A. 137, ¶ 5), "[a]lthough not unprecedented, the idea of divestiture of ownership [is] a departure from the typical Commission approach of limiting any new rules to prospective effect." Thus, in announcing changes in policy, it has frequently grandfathered previously approved non-conforming arrangements or otherwise distinguished between prospective and retroactive applications.[17] In particular, the Commission has done so repeatedly in establishing new rules and policies to promote diversification of ownership.[18] Indeed, in its First Report and Order in this proceeding in 1970, the Commission, in restricting broadcast-

[17] *E.g.*, Revision of FM Broadcast Rules, 23 P&F Radio Reg. 1801, 1834-39 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 784 (1966) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); Cable Television Report and Order, 36 F.C.C.2d 143, 185 (1972) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems).

[18] *See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964); Hearings on Applications for Second VHF Station, 3 P&F Radio Reg.2d 909 (1964); Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg.2d 271 (1965); Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg.2d 1501, 1507 (1968); Multiple Ownership of Standard, FM & TV Broadcast Stations, 22 F.C.C.2d 306 (1970).

ers essentially to one broadcast service in any community, did not require retroactive divestiture. And in many of those prior instances, the Commission expressly referred, as it did here, to the inherently disruptive consequences of divestiture.[19]

The Commission here rationally determined not to risk such disruptive consequences, in part on the basis of its anticipation that the new prospective ban on cross-ownerships could accelerate a process of attrition which was already reducing the size of the problem. As the Commission observed (J.A. 202, ¶ 112 n.29), the number of co-located newspaper-television combinations dropped from 94 in 1970 to 79 in July 1974. And after the rule-making record was closed, the number of co-located combinations was reduced to 65 by transfers of either newspapers or television stations; three additional applications to transfer television stations currently are pending before the Commission. Another 7 would be eliminated by its decision with respect to divestiture in the so-called "egregious" markets (*id.* at 242). Although attrition by itself might not eliminate all cross-ownerships quickly, the Commission's expert judgment that it can rely on license turnover constantly to reduce the size of the problem must be accorded substantial deference.

In opting for an evolutionary approach rather than forced divestiture, the Commission properly took account of a number of factors that serve to guard against any adverse consequences from those cross-ownerships that continue to exist. In the first place, the record revealed no pattern of abuse of common ownership or control of co-located broadcast stations and newspapers (*e.g.*, J.A.

[19] *E.g.*, Report on Chain Broadcasting (Order No. 37, Dkt. No. 5060) 67 (1941); Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 789 (1966); Diversification of Control of CATV Systems, 23 F.C.C. 2d 833, 835 (1970).

186, 200); it also reflected a substantial editorial and operational independence between co-owned press and broadcast outlets (J.A. 219, ¶ 131).[20] To the extent that the Commission might in the future find abuses or other harm to the public interest in individual cases, its policies are fully broad and flexible enough to enable it to deal with such cases in making the licensing and other determinations entrusted to it by the Communications Act.[21] In addition, the Commission has a number of rules and policies—including the fairness doctrine, and the statutory "equal time" and political candidate access requirements—specifically designed to ensure a multiplicity of viewpoints and compensate for any concentration in broadcast ownership or control. J.A. 164. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

At the root of the court of appeals' decision is a disagreement with the relative weight the Commission attaches to the policy of diversification and the measured, step-by-step manner in which it has acted to reach that end. Clearly, however, the Commission may proceed one step at a time, dealing by rule with those aspects of the problem that appear most urgent, and leaving other aspects for later resolution as necessary. *See Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). As this Court reaffirmed in *Geduldig* v. *Aiello*, 417 U.S. 484, 495 (1974), "so long as the line drawn by the [government] is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." If the court of appeals' opinion is read as suggesting that the Commission was unwise and its grandfathering regulation unlikely to protect the interests in diversity the court cherishes, then the rejoinder is this Court's observation in *National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 224, that the courts are "the wrong forum for such a plea. . . . It is not for us to say that the 'public interest' will be furthered or retarded by the [regulations]. The responsibility belongs to Congress for the grant of valid legislative authority and to the Commission for its exercise."

[20] The *Dallas-Times Herald* and Station KDFW-TV, while both under the ultimate control of *Amicus Curiae* Times Mirror, are held by different subsidiaries, and their editorial policies and operations are completely independent of each other.

[21] *See, e.g.*, Anthony Wayne Broadcasting, 19 F.C.C. 383 (1954), *remanded sub nom. Fleming* v. *FCC*, 225 F.2d 523 (1955); Carolinas Advertising, Inc., 42 F.C.C.2d 1027 (1973).

II. In Purporting to Deprive the Commission of All Discretion to Consider Alternative Courses of Action on Remand, the Court of Appeals Exceeded its Authority as a Reviewing Court.

In addition to rejecting the Commission's policy judgment in favor of its own, the court of appeals also erred in ordering the Commission to adopt a rule to require general divestiture and permitting it no latitude to take any other course on remand.

As this Court held in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940), once the reviewing court has identified the legal error in the agency's action, it has "exhausted the only power which Congress gave it." The matter then must be remanded to the agency for reconsideration in light of the court's opinion.[22]

> It is a guiding principle of administrative law, long recognized by this Court, that an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. *NLRB* v. *Food Store Employees Union*, 417 U.S. 1, 9 (1974), *quoting FCC* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 145.

[22] *E.g.*, *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966); *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

A reviewing court lacks authority to write its views into a statute in the guise of scrutinizing an agency action for legal error.

Contrary to these principles, the court of appeals here itself determined precisely the rule the Commission should adopt on remand. It ordered the Commission to adopt a rule stating in effect that "divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest" (J.A. 431; *see* J.A. 442-43).[23] In foreclosing the Commission from the opportunity to determine what degree of divestiture was required, the court of appeals disregarded "the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." *FCC* v. *Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 141.

The court's decision cannot be defended on the ground that the only questions left open on remand were so "crystal-clear [as to render] a remand an unnecessary formality." *NLRB* v. *Food Store Employees Union*, *supra*, 417 U.S. at 8. If its failure to impose divestiture retroactively were held irrational, the Commission would face very complex questions as to what the public interest required. It might rationally have decided that having no cross-ownership rule at all would be preferable to across-the-board divestiture. Similarly, if its selection of 16 monopoly cities for divestiture were irrational, the Commission might have determined to require divestiture in no markets, rather than in all markets, or to adopt some variant of the "percentage combination

[23] We do not read the ambiguous footnote at J.A. 393 n.53 as an indication that the Commission has any room for exercise of discretion on remand. The first two sentences of the footnote describe hypothetical situations that will not arise under the court's mandate, the effect of which is accurately summarized in the last sentence of the footnote.

of the market approach" suggested by Commissioner Robinson in dissent (J.A. 304). But, in any event, these matters would have called for exercise of agency expertise and should have been decided by the Commission in the first instance.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed insofar as it vacated the Commission's decision not to apply its rule retroactively to existing newspaper-broadcast combinations in communities served by other media voices.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF NATIONAL EMERGENCY CIVIL LIBERTIES FOUNDATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

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December 1977

INDEX

PAGE

Interest of *Amicus* 5

Opinions Below 6

Question Presented 6

Statement of the Case 6

ARGUMENT—

I. The Commission's Policy of Assuring Diversity of Ownership and Management in Granting Broadcast Licenses Is a Constitutional Imperative in Light of the Suspect Constitutionality of the System of Exclusive Licensing of Speakers and the Press Effected by the Federal Communications Act. Departures From That Policy Accordingly Must Be Narrowly Drawn and in Furtherance of a Compelling Countervailing Government Interest 9

II. The Commission's Constitutionally Mandated Diversification Policy Properly Extends to Insuring That Broadcast Stations Are Not Owned or Controlled by Individuals Who Also Own or Control Daily Newspapers of General Circulation Located in the Same Community. The Commission Failed to Identify a Compelling Government Interest to Justify Its Refusal to Require Divestiture of Existing Cross-Owned Newspaper-Broadcast Station Groups 19

CONCLUSION 24

Table of Authorities

Cases: PAGE

Abrams v. *United States*, 250 U.S. 616 12
Associated Press v. *United States*, 326 U.S. 1 20

Baird v. *Arizona*, 401 U.S. 1 17
Banzhaf v. *FCC*, 405 F.2d 1082 (D. C. Cir. 1968), *cert. denied*, 396 U.S. 842 9
Brandenburg v. *Ohio*, 395 U.S. 444 17
Brandywine-Main Line Radio v. *FCC*, 473 F.2d 16 (D. C. Cir. 1972), *cert. denied*, 421 U.S. 922 9

Cantwell v. *Connecticut*, 310 U.S. 296 11
Citizens Committee to Save WEFM v. *FCC*, 506 F.2d 246 (D. C. Cir. 1974) 9
Citizens Communications Center v. *FCC*, 447 F.2d 1201 (D. C. Cir. 1971) 9
Clarksburg Publishing Co. v. *FCC*, 225 F.2d 511 (D. C. Cir. 1955) 17, 22
Cohen v. *California*, 403 U.S. 15 11
Columbia Broadcasting System v. *Democratic National Committee*, 412 U.S. 94 9
Cox v. *New Hampshire*, 312 U.S. 569 11
Cox v. *Louisiana*, 379 U.S. 536 11

Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 11

Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D. C. Cir. 1970), *cert. denied*, 403 U.S. 923 9

Hale v. *FCC*, 425 F.2d 556 (D. C. Cir. 1970) 24

Keyishian v. *Board of Regents*, 385 U.S. 589 ..... 12, 17
Kunz v. *New York*, 340 U.S. 290 11

PAGE

Lamont v. *Postmaster General*, 381 U.S. 301 12
Lovell v. *Griffin*, 303 U.S. 444 11

Martin v. *City of Struthers*, 319 U.S. 141 12
Mt. Mansfield Television, Inc. v. *FCC*, 442 F.2d 470 (2d Cir. 1971) 9

National Broadcasting Co. v. *United States*, 319 U.S. 190 ..... 11, 13, 15
National Citizens Committee for Broadcasting v. *FCC*, —— F.2d ——, No. 74-1700 (D. C. Cir.) (Nov. 11, 1977) 9
New York Times Co. v. *Sullivan*, 376 U.S. 254 12

O'Brien v. *United States*, 391 U.S. 367 11

Red Lion Broadcasting Co., Inc. v. *FCC*, 395 U.S. 367 ..... *passim*

Schneider v. *Smith*, 390 U.S. 17 12
Schneider v. *State*, 308 U.S. 147 11
Scripps-Howard Radio, Inc. v. *FCC*, 189 F.2d 677 (D. C. Cir. 1951) 17, 22
Shelton v. *Tucker*, 364 U.S. 479 ..... 11, 12, 17
Shuttlesworth v. *Birmingham*, 394 U.S. 147 11
Southeastern Promotion Ltd. v. *Conrad*, 420 U.S. 546 11
Staub v. *City of Baxley*, 355 U.S. 313 11

Tinker v. *Des Moines Board of Education*, 393 U.S. 503 11

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 ..... 16, 17
United States v. *Zenith Radio Corp.*, 12 F.2d 614 (N. D. Ill. 1926) 13

PAGE

Whitney v. *California*, 274 U.S. 357 12

Agency Decisions:

Amendment of the Multiple Ownership Rules (Docket No. 8967), 18 Fed. Reg. 7796 (1953), 18 F.C.C. 299 (1953) 16

Duopoly Rules, 5 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943) 16

In re National Broadcasting Co., 19 F.C.C. 2d 713 23

Multiple Ownership Rules (Docket No. 18110):

Notice of Proposed Rulemaking, 33 Fed. Reg. 5315 (1968) 6

First Report and Order, 22 F.C.C. 2d 306 (1970) 7, 16, 23

Further Notice of Proposed Rulemaking, 22 F.C.C. 2d 339 (1970) 7, 20

Second Report and Order, 50 F.C.C. 2d 1046 (1975) ..... *passim*

Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944) 22

Northeastern Indiana Broadcasting Co., 9 R. R. 261 (1953) 22

Order No. 79-A, 6 Fed. Reg. 3302 (July 8, 1941) 21

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965) 17

Report on Chain Broadcasting (Order No. 37, Docket No. 5060) (1941) 15

Constitutional Provisions: PAGE

First Amendment ..... *passim*

Statutes:

Federal Communications Act of 1934, 47 U.S.C. § 151, *et seq.* ..... *passim*

§ 303 14
§ 303(r) 14
§ 307 14
§ 307(a) 14
§ 307(d) 24
§ 309(a) 14
§ 309(h) 14, 24

Federal Radio Act of 1927, 44 Stat. 1163 10

Miscellaneous Authorities:

47 CFR §§ 73.123, 73.300, 73-598, 73-679 14

35 Op. Atty. Gen. 126 (1926) 13

Roper, *A Ten-Year View of Public Attitudes Toward Television and Other Media: 1959-1968* (1969) 20

Steiner, *The People Look at Television* (1963) 20

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF NATIONAL EMERGENCY CIVIL LIBERTIES FOUNDATION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 42(3) of the rules of the Court, the National Emergency Civil Liberties Foundation moves for leave to file a brief *amicus curiae* in the above-entitled case and in the cases consolidated with it. The attorneys for the petitioner and the respondent in the above-entitled case and in case Nos. 76-1624[1] and 76-1685[2] have consented to

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[1] *Illinois Broadcasting Company, Inc.* v. *National Citizens Committee for Broadcasting.*

[2] *Post Company* v. *National Citizens Committee for Broadcasting.*

the filing of the attached brief.[3] The attorneys for the petitioners in case Nos. 76-1604[4] and 76-1595[5] refused consent. The attorney for the petitioner in case No. 76-1521[6] failed to respond to a request for consent.

The National Emergency Civil Liberties Foundation, Inc. (NECLF) is a not-for-profit public foundation organized to protect and defend the rights and liberties guaranteed by the Constitution and the Bill of Rights. The Foundation was established in 1971 to continue and expand the similar work of the National Emergency Civil Liberties Committee (NECLC), which was founded in 1951. Attorneys for NECLF and NECLC have appeared in numerous cases before this Court, the lower federal courts and federal administrative agencies in defense of the rights of freedom of speech and the press and of the public's right to access to information from diverse and antagonistic sources.

The National Emergency Civil Liberties Foundation has become increasingly concerned with issues involving the role of the broadcast media, particularly television, in modern society. Television at once presents the greatest

[3] The letters of consent have been lodged with the Clerk of the Court.

[4] *American Newspaper Publishers Association* v. *National Citizens Committee for Broadcasting.*

[5] *National Association of Broadcasters* v. *Federal Communications Commission.*

[6] *Channel Two Television Company* v. *National Citizens Committee for Broadcasting.*

potential of all media for the furtherance of the goals and policies of the First Amendment, and also the greatest potential for abuse, manipulation and destruction of those goals and values.

Accordingly, attorneys for the Foundation represented the Socialist Workers Party before the Federal Communications Commission, the United States Courts of Appeals for the Second and District of Columbia Circuits, and this Court in proceedings in 1976 arising from the Party's efforts to enforce Section 315 of the Federal Communications Act. See *Socialist Workers Party* v. *Federal Communications Commission,* petition for writ of certiorari, October Term 1976, No. 76-470. More recently, the Foundation filed lengthy comments with the Federal Communications Commission in the Commission's inquiry into *Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest,* Docket No. 21049 (1977). And the Foundation has submitted proposals to the Communications Subcommittee of the House of Representatives Committee on Interstate and Foreign Commerce, which is the process of an exhaustive reexamination of the premises and structure of the Federal Communications Act.

The present case raises the issue of whether one of the few broadcast television licenses in a given community should be granted or renewed to a licensee who also owns and publishes a daily newspaper of general circulation in the same community. The question is a complex one which involves construction of the "public interest" standard of the Federal Communications Act and of the First Amendment. Critical constitutional questions are involved. We

believe that our brief will be of substantial assistance to the Court.

Respectfully submitted,

ERIC M. LIEBERMAN
Attorney for Movant

December 1977

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

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BRIEF OF NATIONAL EMERGENCY CIVIL LIBERTIES FOUNDATION, *AMICUS CURIAE*

The National Emergency Civil Liberties Foundation, as *Amicus Curiae,* urges the Court to affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit for the reasons set forth in this Brief and in the opinion below of the court of appeals.

Interest of *Amicus*

The interest of *Amicus* is stated in the Motion for Leave to File, *ante.*

Opinions Below

The opinion of the court of appeals (App. 339)[1] is reported at 555 F.2d 938. The order granting in part the Commission's motion for stay of mandate (App. 435) is reported at 555 F.2d 967. The orders of the Commission (App. 134, 317) are reported at 50 F.C.C. 2d 1046 and 53 F.C.C. 2d 589.

Question Presented

Whether, in the absence of a countervailing compelling public interest, the Federal Communications Commission was required, pursuant to the First Amendment and the "public interest" standard of the Federal Communications Act, to order divestiture of existing combinations of cross-owned newspaper-broadcast station groups in the same community, subject to applications for waiver in exigent circumstances?

Statement of the Case

On March 27, 1968, the Federal Communications Commission invited comments on proposed rules which would limit a broadcast licensee to one broadcast station of any kind (either AM or FM radio or television) in the same market. *Notice of Proposed Rulemaking*, 33 Fed. Reg. 5315 (Docket No. 18110). The Notice stressed that the Commission's purpose was "to promote maximum diversification of programming sources and viewpoints." The Commission did not propose rules affecting common ownership of broadcast stations and daily newspapers.

[1] References to "App." are to pages in the joint appendix filed by the parties.

In 1970 the Commission issued its *First Report and Order*, 22 F.C.C. 2d 306 (App. 33) in which it adopted the proposed rules. On the same day, in response to suggestions of the respondent herein and the Justice Department, the Commission issued a *Further Notice of Proposed Rulemaking*, 22 F.C.C. 2d 339, in which it proposed to require divestiture within five years of all existing newspaper-broadcast or television-radio combinations in the same market. Future creation of such combinations also would be prohibited. In support of its proposed rules, the Commission stated:

> In view of the primary position of the daily newspaper of general circulation and the television broadcast station as sources of news and other information, and discussion of public affairs, particularly with respect to local matters, it is not desirable that these two organs of mass communication should be under the same control in any community. A direct parallel would be the ownership of two television stations in the same community by the same person, which the Commission, without substantial disagreement from any source, has never permitted. The functions of newspapers and television stations as journalists are so similar that their joint ownership is, in this respect, essentially the same as the joint ownership of two television stations.

22 F.C.C. 2d at 346 (App. 115).

Following issuance of the *Further Notice*, the Commission deferred to the rulemaking all pending and future license renewal challenges alleging undue concentration involving newspaper-television cross-ownership. It renewed such licenses until determination of the rulemaking proceeding.

On January 31, 1975 the Commission issued its *Second Report and Order*, 50 F.C.C. 2d 1046 (App. 134), ter-

minating the proceeding. The Commission adopted a prospective rule banning new newspaper-broadcast cross-ownerships, whether created by an initial application and construction or by acquisition. It did so in furtherance of its long-standing policy, rooted in the First Amendment, of encouraging diversification of media voices in granting broadcast licenses.

The Commission declined, however, to order divestiture of existing newspaper-broadcast station combinations except in a small number of "egregious" (small-market absolute monopoly) combinations. The Commission stated that divestiture is a "harsh remedy" and would not be required absent a showing that "the need is overwhelming and the evidence unambiguous." 50 F.C.C. 2d at 1083 (App. 207). Commissioners Hooks and Robinson dissented in part on the divestiture question.

The court of appeals affirmed the Commission's rules imposing a prospective cross-ownership ban, but vacated that part of the Commission's order which failed to order divestiture except in "egregious" monopoly situations. The court held that the Commission properly could determine, as it did, that it is in the public interest to prohibit newspaper—broadcast cross-ownership in the same locality in furtherance of its longstanding policy of encouraging diversity of media voices. The court further held that departure from that diversification policy must be justified by rational and compelling countervailing public interests. The court found that the Commission improperly had reversed the presumption in favor of its diversification policy by refusing to order divestiture in the absence of a showing of overwhelming need. Finally, the court reviewed the reasons given by the Commission for declining to order divestiture and held that they did not meet the burden necessary to justify departure from the Commission's

diversification policy. It remanded the record so that the Commission could promulgate a rule on the issue after applying the proper rule of law.

ARGUMENT

I.

The Commission's Policy of Assuring Diversity of Ownership and Management in Granting Broadcast Licenses Is a Constitutional Imperative in Light of the Suspect Constitutionality of the System of Exclusive Licensing of Speakers and the Press Effected by the Federal Communications Act. Departures From That Policy Accordingly Must Be Narrowly Drawn and in Furtherance of a Compelling Countervailing Government Interest.

Once again the Court is called upon to resolve difficult issues arising out of the administration of the Federal Communications Act of 1934, 47 U.S.C. § 151, *et seq.* *Cf.*, *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367; *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94. The single outstanding feature of each of these cases, and of a host of similar cases decided by the federal courts of appeals,[2] is that they involve the question of who will be allowed to

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[2] See, *e.g.*, *Mt. Mansfield Television, Inc.* v. *Federal Communications Commission*, 442 F.2d 470 (2d Cir. 1971); *Brandywine-Main Line Radio* v. *Federal Communications Commission*, 473 F.2d 16 (D. C. Cir. 1972), *cert. denied*, 421 U.S. 922; *Citizens Committee to Save WEFM* v. *Federal Communications Commission*, 506 F.2d 246 (D. C. Cir. 1974); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D. C. Cir. 1970), *cert. denied*, 403 U.S. 923; *Banzhaf* v. *FCC*, 405 F.2d 1082 (D. C. Cir. 1968), *cert. denied*, 396 U.S. 842; *Citizens Communications Center* v. *FCC*, 447 F.2d 1201 (D. C. Cir. 1971); *National Citizens Committee for Broadcasting* v. *FCC*, —— F.2d ——, No. 74-1700 (D. C. Cir.) (Nov. 11, 1977).

"speak" in the forum of over-the-air broadcasting and who will be foreclosed from speaking. That such questions are entrusted at all to a government agency is quite remarkable in a constitutional system with a First Amendment which proclaims that "Congress shall make no law abridging the freedom of speech, or of the press . . . ." The fact that such questions do arise persistently is a result of choices made by Congress when it enacted the Federal Radio Act of 1927, 44 Stat. 1163, and the Federal Communications Act of 1934, *supra*. Resolution of such questions, and, in particular, resolution of the newspaper-broadcast station cross-ownership issue, must begin with analysis of the unique and constitutionally suspect choices Congress made in enacting the Federal Communications Act.

The basic fact about the Federal Communications Act is that it does exactly what the First Amendment states Congress may not do: it abridges the freedom of speech and of the press. By creating a system of exclusive licenses for operation of broadcast frequencies, the Act empowers the Commission to decide who may speak and who may not. A non-licensee is totally precluded from use of the broadcast media unless he can persuade a licensee to allow him access to use the broadcast facilities.

Such a system of exclusive licensing ordinarily is anathema to the regime established by the First Amendment:

> The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish *"without* a license what formerly could be published only *with* one." [Wickwar, *The Struggle for the Freedom of the Press* 15.]

Lovell v. *Griffin*, 303 U.S. 444, 451. See also *Kunz* v. *New York*, 340 U.S. 290; *Staub* v. *City of Baxley*, 355 U.S. 313; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147. Certainly the government would be precluded from permitting, by license or otherwise, selected members of the public to speak at a public forum, park, or auditorium to the exclusion of all other members of the public. *Shuttlesworth* v. *Birmingham, supra*; *Southeastern Promotion, Ltd.* v. *Conrad*, 420 U.S. 546; *Cox* v. *Louisiana*, 379 U.S. 536. While the government may regulate the time, place and perhaps manner[3] of public speech in furtherance of a compelling interest, such as to prevent disruption of the peace or to assure that many speakers do not attempt to use the same forum simultaneously, it must do so in a neutral fashion without favoring one speaker over others. *Cox* v. *New Hampshire*, 312 U.S. 569; *Cox* v. *Louisiana, supra*; *Shuttlesworth* v. *Birmingham, supra*. Additionally, government regulation must be narrowly drawn so as to have the least restrictive impact on public speech. *Schneider* v. *State*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Shelton* v. *Tucker*, 364 U.S. 479.

The historic rationale for granting exclusive broadcast licenses was that the broadcast frequency spectrum is limited, and it was necessary for the government to impose a licensing system to prevent competing broadcasters from rendering the spectrum unusable. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266; *National Broadcasting Co.* v. *United States*, 319 U.S. 190.

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[3] The permissibility of restrictions upon the "manner" of speech restrictions is constitutionally questionable, given the Court's growing recognition that the manner of speech often is inextricably intertwined with its content, so that to restrict the manner is to censor the impact of the message. See *Tinker* v. *Des Moines Board of Education*, 393 U.S. 503; *Cohen* v. *California*, 403 U.S. 15. But see *O'Brien* v. *United States*, 391 U.S. 367.

> Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest or necessity."

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. at 375-377.

The flaw in the rationale is that it accepted the system of exclusive licensing as the only solution to the problem of scarcity of frequencies, without considering other resolutions which would not have trenched so heavily on the First Amendment rights of non-licensees to speak and of the public to have access to diverse sources of information, speech and press coverage.[4] While the need for *some* solution to the problem was obvious—and "compelling" in terms of First Amendment analysis—no effort was made to tailor Congress' interference with First Amendment rights to the narrowest possible scope to achieve that purpose. See *Shelton* v. *Tucker*, 364 U.S. 479, 488; *Schneider* v. *Smith*, 390 U.S. 17, 24; *Keyishian* v. *Board of Regents*, 385 U.S. 589.

Congress certainly was aware of less restrictive alternatives to the one adopted. For example, licenses could have

[4] See *Abrams* v. *United States*, 250 U.S. 616, 630 (Holmes, J., dissenting); *Whitney* v. *California*, 274 U.S. 357, 375-376 (Brandeis, J., concurring); *Martin* v. *City of Struthers*, 319 U.S. 141, 143; *Lamont* v. *Postmaster General*, 381 U.S. 301; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270.

been granted for the establishment of broadcast stations on a common carrier basis, with the facilities open to all. Such a system would not have barred anyone from the right of access to the broadcast media, and would have regulated access in a neutral "time and place" manner.

Still another alternative remedy actually was attempted during the mid-1920s, before Congress adopted the present licensing system when it enacted the Radio Act of 1927, *supra*. The Secretary of Commerce sought to deal with the scarcity problem "by limiting the power and hours of operation of stations in order that several stations might use the same channel." *National Broadcasting Co.* v. *United States*, 319 U.S. at 211. The effort failed when the courts and the Attorney General held that the Secretary lacked the statutory power to do so. *United States* v. *Zenith Radio Corp.*, 12 F.2d 614 (N. D. Ill. 1926); 35 Op. Atty. Gen. 126 (1926). The use of this alternative was opposed successfully by the already established radio interests when Congress considered proposals which lead to the enactment of the Radio Act of 1927. See *National Broadcasting Co.* v. *United States*, 319 U.S. at 211.

Congress, of course, rejected the alternatives suggested above, each of which would have abridged First Amendment rights to a much lesser extent than the exclusive licensing system actually established. The Court never has considered the question whether Congress' rejection of such alternatives was permissible, particularly in light of the relatively recent development of the First Amendment doctrines of "less restrictive alternatives" and "overbreadth."[5] In *Red Lion*, however, the Court suggested that the development and expansion of FCC policies designed to pro-

[5] The question, of course, is not raised directly in the present case and *Amicus* does not urge that it be reached here. It must be considered, however, as bearing directly on the resolution of the question here presented, as we argue in the text, *post*.

tect First Amendment "values" in furtherance of the "public interest" standard of the Communications Act,[6] such as the personal attack and political editorial rules[7] and the fairness doctrine,[8] served as substitutes for the less restrictive licensing alternatives and therefore might save the exclusive licensing system from constitutional invalidity.

> Rather than confer frequency monopolies on a relatively small number of licensees . . . the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a different view from that which

[6] The Commission is authorized to promulgate "such rules and regulations and prescribe such restrictions and conditions" "as public convenience, interest or necessity requires." 47 U.S.C. § 303, 303(r). It must consider the demands of the public interest in the course of granting or denying licenses, 47 U.S.C. §§ 307(a), 309(a), renewing them, 47 U.S.C. § 307, and modifying them. *Id.* It must include among the conditions of the licenses it issues the requirement that operation of the station be carried out in the public interest. 47 U.S.C. § 309(h).

[7] 47 CFR §§ 73.123, 73.300, 73.598, 73.679.

[8] The history and content of the fairness doctrine is described in *Red Lion*, 395 U.S. at 377-379:

> There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The broadcaster must give adequate coverage to public issues . . ., and coverage must be fair in that it accurately reflects the opposing views . . . . This must be done at the broadcaster's own expense if sponsorship is unavailable, . . . Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source.

Id. at 377-378 (citations omitted).

> already has been expressed on his station . . . As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.
>
> • • •
>
> There is no sanctuary in the First Amendment for unlimited private censorship in a medium not open to all. "Freedom of the Press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. at 390-392.

The Court's insight in *Red Lion* was well-founded. Without the leavening effect of such doctrines as were at issue in *Red Lion*, the bald infringement of First Amendment rights effected by the Communications Act surely could not stand. And at least as necessary and important, and probably more so, as the fairness doctrine and the equal time and personal attack rules in providing constitutional support and sanction to the scheme of the Act is the Commission's policy of insuring that its licensees represent as many diverse speakers and points of view as can practically be achieved. It is this diversification policy which is at issue in the present case.

The diversification policy is of long-standing. In 1941 the Commission decided that it would not grant additional licenses to the NBC and CBS radio networks, and ordered that NBC divest one of its dual networks.[9] Between 1941 and 1943 the Commission adopted its "duopoly" rules bar-

[9] *Report on Chain Broadcasting*, Docket 5060 (1941), *affirmed*, *NBC* v. *United States*, 319 U.S. 190.

ring common ownership in the same community of two local broadcast stations of the same type, and requiring divestiture of commonly-owned AM stations.[10] In 1953 the Commission adopted rules specifying maximum numbers of TV, AM and FM stations which a single licensee can own or control on a national basis.[11] See the general discussion of these and other actions in the opinion of the court of appeals, 555 F.2d at 944-945 (App. 350-352).

In each of the actions described, the Commission and the courts, including this Court, justified the actions taken by the "public interest" standard of the Communications Act and as finding support in the First Amendment. As the Commission noted in its *First Report and Order* in the present proceeding:

> Basic to our form of government is the belief that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (*Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).)
>
> • • •
>
> These principles, upon which Judge Learned Hand observed that we had staked our all, are the wellspring, together with a concomitant desire to prevent undue economic concentration, of the Commission's policy of diversifying control of the powerful medium of broadcasting. For centralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable. The power to

[10] *Duopoly Rules*, 5 Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943).

[11] *Amendment of the Multiple Ownership Rules*, 18 Fed. Reg. 7796, 7797 (1953), 18 F.C.C. 288 (1953), *affirmed*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192.

> control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use.

22 F.C.C. 2d 306, 310 (App. 40-41). See also *United States* v. *Storer Broadcasting Co., supra; Clarksburg Publishing Co.* v. *FCC*, 225 F.2d 511, 519 (D. C. Cir. 1955); *Scripps-Howard Radio, Inc.* v. *FCC*, 189 F.2d 677 (D. C. Cir. 1951); *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965).

Indeed, the Commission recognized the constitutional imperative behind its diversification policy in its *Second Report and Order* in the present proceeding, where it said that its prime time access rules were "consistent with our *obligations* under the First Amendment to promote diversity of program sources." 50 F.C.C. 2d at 1049 (App. 140). Unfortunately, the Commission did not analyze the significance of its First Amendment obligations in refusing to require divestiture in the present case.

Once it is recognized that the diversification policy is constitutionally mandatory under the existing Communications Act, analysis of the issues raised in the present case becomes easier. A policy or action which increases the diversity of the mass communications media must be favored presumptively, and an opponent of such action must carry a heavy burden to justify departure from the general rule. For where First Amendment rights are at stake, they may be restricted only in furtherance of a compelling *government* interest. *Cf.*, *Keyishian* v. *Board of Regents, supra; Brandenburg* v. *Ohio*, 395 U.S. 444; *Shelton* v. *Tucker*, 364 U.S. 479; *Baird* v. *Arizona*, 401 U.S. 1. The same rule should apply when the Commission seeks to depart from a general policy which it consistently has found to be in the public interest.

Indeed, in this very proceeding the Commission determined that separate ownership of newspapers and television stations in the same area is markedly in the public interest.

> If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. This is not a reflection on the efforts of combination owners in diligently serving the public interest. Rather, it is a recognition that it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.

50 F.C.C. 2d at 1079-1080 (App. 200).

The court of appeals held that the Commission was correct in its view that the "public interest" and the First Amendment support separate ownership. The court went on to hold, however, that the Commission failed to identify sufficient countervailing interests which compelled grandfathering of existing cross-owned combinations.

The court of appeals decision is attacked on several grounds. First, several parties urge that whatever power the Commission may have to pursue a diversification policy among broadcasters does not extend to a power to require diversification between broadcasters and newspaper owners. Second, the Commission and several parties supporting it assert that it was not required to order divestiture in furtherance of its general policy, which it applied prospectively, of seeking separate ownership of co-located newspapers and broadcast stations.

We treat of these issues briefly in the next section of the Brief. For full analysis of the inadequacy of the several grounds relied upon by the Commission for its departure from the diversification policy on the divestiture issue, we rely in major part upon the opinion of the court of appeals and the briefs filed by the respondent and the Solicitor General. *Amicus* emphasizes that in analyzing these questions it is essential to bear in mind the suspect constitutionality of the exclusive licensing system of the Communications Act, and the critical and essential role of a diversification policy in providing constitutional support and justification of that system, if indeed it can be justified and supported at all.

II.

The Commission's Constitutionally Mandated Diversification Policy Properly Extends to Insuring That Broadcast Stations Are Not Owned or Controlled by Individuals Who Also Own or Control Daily Newspapers of General Circulation Located in the Same Community. The Commission Failed to Identify a Compelling Government Interest to Justify Its Refusal to Require Divestiture of Existing Cross-Owned Newspaper-Broadcast Station Groups.

Several parties argue that the Commission may not extend its policy of assuring diversity of broadcast licensees to prohibit co-ownership of a newspaper and broadcast station in the same locality. This, it is argued, amounts to regulation of all mass media, whereas the Commission is empowered to regulate only broadcast media.

The simple answer is that in prohibiting cross-ownership the Commission neither intends to nor does regulate newspapers, *per se*, any more than it regulates other unsuccessful applicants for a license. The Commission necessarily must consider a host of factors in allocating licenses on a comparative basis in furtherance of the public interest.

Some factors are discretionary with the Commission. Others, such as the diversification policy, are constitutionally mandated. In considering to whom it will grant a license to speak, to the exclusion of other voices, the Commission not only may but must take into account whether or not the applicant for the license already has an effective means of reaching the public, particularly through another medium of mass communications. See *Associated Press* v. *United States*, 326 U.S. 1, 20. The possibility that denial of licenses to newspapers may indirectly affect the economics of publication does not provide newspapers with protection against such regulation in the public interest. *Id.*

Indeed the need for a cross-ownership rule is quite compelling, especially with respect to the newspaper-television question. The evidence is overwhelming that the public relies almost exclusively on these two sources for its news and information in public affairs. Roper, *A Ten-Year View of Public Attitudes Toward Television and Other Media: 1959-1968* (1969); *Further Notice of Proposed Rulemaking*, 22 F.C.C. 2d 339, 344 (App. 112); Steiner, *The People Look at Television* (1963). To permit significant concentration of control over these two media by one voice in a given locality, even short of monopoly, grossly exacerbates the abridgment of the freedom of speech and the press effected by the exclusive licensing system of the Communication Act.

Accordingly, the Commission long has been concerned with the problem of newspaper-broadcast joint control. In the early 1940's it announced an inquiry on the subject and stated its intent to determine:

> Whether joint association of newspapers and broadcast stations tend or may tend to. . . .
>
> • • •

> 2 . . . prejudice the free and fair presentation of public issues and information over the air, or to cause editorial bias or distortion, or to inject editorial policy or attitude into the public service rendered by broadcast stations as a medium of public communication.
>
> 3 . . . restrict or distort the broadcasting of news, or to limit the sources of news to the public, or to affect adversely the relation between news-gathering services and broadcast stations.
>
> 4 . . . have any effect upon freedom of access to the radio forum, for the discussion of public issues.
>
> 5 . . . lessen or increase competition among broadcast stations or to result in the monopolization of local broadcast facilities.
>
> • • •
>
> 7 . . . constitute an undue concentration of control over the principal media for public communication.

6 Fed Reg. 3302 (Order No. 79-A) (July 8, 1941).

Following the inquiry, the Commission concluded that the information gathered did not warrant a general rule barring newspaper ownership of radio stations at that time. Nevertheless, the Commission strongly stated its intentions to consider future potential newspaper-broadcast concentration issues on a case by case basis:

> [T]he Commission recognizes the serious problem involved in the broader field of the control of the media of mass communications and the importance of avoiding monopoly of the avenues of communicating fact and opinion to the public. All the Commissioners agree to the general principle that diversification of control of such media is desirable. . . . [*The Commission*] *does*

> ***not intend in granting licenses in the public interest to permit concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee.***

Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944) (Emphasis added).

Since 1944, the courts and the Commission have held that newspaper-broadcast cross-ownership, like other forms of media concentration, must be given critical weight both in rulemaking and individual licensing proceedings. See, *e.g., Clarksburg Publishing Co.* v. *FCC*, 225 F. 2d 511 (D.C. Cir. 1955); *Scripps-Howard Radio, Inc.* v. *FCC*, 189 F. 2d 677 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 830; *Northeastern Indiana Broadcasting Co.*, 9 R.R. 261 and 318a (1953).

It is true that until the present proceeding the Commission never flatly prohibited future newspaper-broadcast cross-ownerships, let alone required divestiture. It justified its refusal to follow such a blanket diversification policy in the past by reliance on what it believed to be a compelling interest—that the then-new and not yet profitable broadcast industry could benefit substantially from the financial and journalistic resources of newspapers. Whatever the constitutional validity of that interest as a justification for departure from its general diversification policy, the Commission in the present proceeding quite properly found that it no longer may serve as such a justification.

> Now, unlike then, the broadcast medium has matured. While not all have made profits, for the most part it is the particular market situation or the newness of the operation that is the cause. Thus, the special reason for encouraging newspaper ownership, even at the cost of a

> lessened diversity, is no longer generally operative in the way it once was. Nor are newspapers the sole reservoir of experience on which reliance has to be placed. To the extent that TV (or radio) facilities are worth applying for, qualified and experienced applicants can be expected to step forward. Newspapers are not the only interested parties. The Commission is obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was.

Second Report and Order, 50 F.C.C. 2d at 1074-1075 (App. 190-191). See also *First Report and Order*, 22 F.C.C. 2d at 312 (App. 45-46).

Nevertheless, the Commission relied upon the fact that it previously did not impose an absolute ban on newspaper-broadcast cross-ownerships as a reason for refusing to order divestiture in the absence of a showing that tangible harm would result from grandfathering. The Commission thereby reversed the mode of analysis it applied in promulgating its prospective rule, *i.e.*, that a departure from the diversification policy must be justified by a compelling government interest. Instead, the Commission demanded compelling justification in favor of divestiture, requiring a showing that "the need [for divestiture] is overwhelming and the evidence unambiguous." 50 F.C.C. 2d at 1083 (App. 207). Given the constitutional mandate of its diversification policy, the Commission's reversal of the burden of justification was impermissible.[13]

---

[13] The burden imposed by the Commission will be impossible to sustain as a practical matter. Former Commissioner Johnson has noted that the majority of media abuses remain undiscovered, due to the lack of written records and the fact that station managers rarely resort to overt documentable pressures. *In re National Broadcasting Co.*, 19 F.C.C. 2d 713, 720-723 (dissenting opinion). And Judge Tamm has explained that documentation of abuses

The mere fact that under divestiture former licensees will lose their license by itself hardly is a compelling interest justifying departure from the diversification policy. The Communications Act specifically states that a licensee has no interest in his license beyond the expiration date. 47 U.S.C. §§307(d), 309(h). Divestiture, in any event, would not work a forfeiture upon former licensees, who would be given sufficient opportunity to sell or trade their licenses, and who could apply for time waivers if necessary to protect against undue hardship.

Accordingly, the Commission must point to specific, articulable reasons of a compelling nature to justify a refusal to order divestiture. The reasons offered by the Commission simply failed to meet that burden, as the court of appeals opinion convincingly argues. *Amicus* relies upon the court's opinion on those questions, and leaves it to the respondent herein to argue them fully.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

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"would require not only program monitoring but also laborious perusal of reams of documentary evidence which will likely be dispersed, inaccessible and unintelligible to one who is not skilled in the intricacies of antitrust and communications law." *Hale* v. *FCC*, 425 F. 2d 556, 565 (D.C. Cir. 1970) (concurring opinion).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

(Consolidated with Nos. 76-1521, 76-1595, 76-1604, 76-1624 and 76-1685)

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Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, et al.,

Respondents.

MOTION OF THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

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TABLE OF CONTENTS

PAGE

Motion of the Office of Communication of The United Church of Christ, The National Association for the Advancement of Colored People and The American Civil Liberties Union for Leave to File Brief *Amici Curiae* v

BRIEF:

Preliminary 1

Summary of Argument 2

ARGUMENT:

I—The *Second Report* finds that the First Amendment goal of diversity of media voices has primary significance. But it inconsistently perpetuates extreme media monopolies 4

II—The rationales for grandfathering existing cross-owners do not apply in Birmingham, Syracuse or Atlanta. Nevertheless, the Commission refused to consider waivers 9

A. Continuity of Operation 10

B. Local Ownership and Integration of Ownership and Management 12

C. Economic Dislocations 12

D. Unfairness to Licensees 13

III—The Commission's *ad hoc* test cannot reasonably be met. The test serves to immunize cross-owners from renewal challenges 14

PAGE

A. The Commission Refuses To Presume Monopolization or Harm Upon a Showing of Extreme Concentration 15

B. The Commission Has Placed An Unfair and Unreasonable Burden on Citizen Petitioners To Prove Monopolistic Abuses 16

Conclusion 19

CASES CITED

Associated Press v. *United States*, 326 U.S. 1 (1945) 5

Bilingual Bicultural Coalition on Mass Media v. *FCC*, 492 F. 2d 656 (D.C. Cir. 1974) 14

Black Broadcasting Coalition of Richmond v. *FCC*, 556 F. 2d 59 (D.C. Cir. 1977) 17

Brandywine-Main Line Radio v. *FCC*, 473 F. 2d 16 (D.C. Cir. 1972) 18

Chronicle Broadcasting Co., 16 FCC 2d 882 (1969) .. 2

Citizens Committee to Save WEFM v. *FCC*, 506 F. 2d 246 (D.C. Cir. 1974) 13

Columbia Broadcasting Co., Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 18

Federal Power Commission v. *Texaco*, 377 U.S. 33 (1964) 10

Frontier Broadcasting Co., 21 FCC 2d 570 (1970) 2

Hale v. *FCC*, 425 F.2d 556 (D.C. Cir. 1970) 10, 16

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 10

PAGE

Newhouse Broadcasting Corporation (*KTVI-TV*), 62 FCC 2d 280 (1976) 7

Newhouse Broadcasting Corporation (*WSYR-TV*), 62 FCC 2d 271 (1977), *reconsideration pending* 8, 15, 17

Newhouse Broadcasting Corporation (*WSYR-TV*), 51 FCC 2d 336 (1975), *appeal pending sub nom. Syracuse Coalition for the Free Flow of Information in Broadcast Media* v. *FCC*, D.C. Cir. Case No. 75-1308 8

Newhouse Broadcasting Corporation (*WAPI-TV*), 59 FCC 2d 218 (1976), *reconsideration denied*, 61 FCC 2d 718 (1976), *appeal pending sub nom. Magic City Communication Coalition* v. *FCC*, D.C. Cir. Case No. 76-2088 .....8, 15, 17, 18

Office of Communication of United Church of Christ v. *FCC*, 425 F. 2d 543 (D.C. Cir. 1969) 18

Office of Communication of United Church of Christ v. *FCC*, 465 F.2d 519 (D.C. Cir. 1972) 10

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 4, 5

Scripps-Howard Television, Inc. v. *FCC*, 189 F. 2d 677 (D.C. Cir. 1951) 4

United States v. *Aluminum Co. of America*, 148 F. 2d 416 (2nd Cir. 1945) 15

United States v. *E. I. Du Pont de Nemours*, 351 U.S. 377 (1956) 15

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966) 15

United States v. *RCA*, 358 U.S. 334 (1959) 8

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 10

PAGE

WAIT Radio v. *FCC*, 418 F.2d 1153 (D.C. 1969) ... 10

WGAL-TV, 39 RR 2d 457 (1976) 8

STATUTES AND RULES CITED

5 U.S.C. § 706(2) (A) 3

47 U.S.C. § 304 13

§ 309(a) 4

MISCELLANEOUS

Bishop, The Rush to Chain Ownership, Columbia Journalism Review, November/December, 1972 .. 13

Broadcasting, January 5, 1976 p. 89 7

Broadcasting in America, 1975, access Magazine, December 1, 1975 11

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IN THE

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OCTOBER TERM, 1977

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(Consolidated with Nos. 76-1521, 76-1595, 76-1604, 76-1624 and 76-1685)

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Respondents.

MOTION OF THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Office of Communication of the United Church of Christ, the National Association for the Advancement of Colored People and the American Civil Liberties Union hereby respectfully move, pursuant to Rule 42 of this Court's rules, for leave to file the within brief as *amici curiae* in support of affirmance of the judgment of the United States Court of Appeals for the District of

Columbia Circuit. Consent to the filing of this brief has been granted by Petitioner, Federal Communications Commission, and by Respondent, National Citizens Committee for Broadcasting. However, consent was refused by the National Association of Broadcasters, necessitating the instant motion.[1]

The Office of Communication of the United Church of Christ ("UCC") is the national instrumentality of the United Church of Christ which is charged by the Church Constitution with its ministry to the mass media. The United Church of Christ is composed of independent local congregations having about 1.8 million members. UCC has long been concerned with the protection of citizen rights in the broadcast media, including the paramount right to diverse sources of information.

The National Association for the Advancement of Colored People ("NAACP") is a non-profit membership association representing the interest of more than 500,000 members throughout the United States. For many years the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. It has often appeared before state and federal courts and administrative bodies as complainant and as an *amicus* in cases dealing with fundamental human rights.

The American Civil Liberties Union ("ACLU") is a nationwide non-partisan organization of over 200,000 members, dedicated to defending the Bill of Rights. Central among those rights are those embodied in the First Amendment.[2] Since 1945, it has been the policy of the

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[1] The NAB argued that the parties already involved represent a broad spectrum of viewpoints on the issues. While there appears to be a proliferation of parties, including *amici*, arguing for reversal, we believe that at most one additional *amicus* (who was also refused consent by newspaper-broadcast interests), will be filing a brief in support of affirmance.

[2] UCC and ACLU participated as *amici* in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

ACLU to urge government action to promote greater competition and thus to encourage diversity where economic concentration in the communications field acts to deny the public access to many sources of news, information and opinion.

This case involves the procedural regularity and rationality of the decision of the Federal Communications Commission ("Commission") to exempt existing co-located newspaper-television combinations from its policy against such combinations except in cases of "effective local media monopoly" or of "specific showing of public harm."[3] The Court of Appeals for the District of Columbia Circuit[4] found that the exemption did not "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. § 303(g)), or enhance First Amendment goals of diversity (555 F. 2d at 962-63). The Court further found that the considerations found by the Commission to outweigh First Amendment goals were speculative and unsupported by the record. Finally, the Court noted that the Commission had not only unreasonably maintained the status quo, but had "solidifie[d] the position of existing combinations by making petitions to deny more difficult." (*Id.* at fn. 108).

Amici submit this brief so that the correctness of the Circuit Court's decision need not be examined in a vacuum. Each of them is currently engaged in renewal challenges involving newspaper/television cross ownerships. The Commission's dismissals of two of these challenges were grounded on the *Second Report*. Appeals have been stayed pending this Court's decision herein. Action on the third challenge is apparently being held in abeyance by the Commission.

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[3] *Second Report and Order*, Docket 18110, 50 FCC 2d 1046 (1975), *reconsideration*, 53 FCC 2d 589 (1975) (hereinafter "Second Report").

[4] *National Citizens Committee for Broadcasting* v. *FCC*, 555 F. 2d 938 (D.C. Cir. 1977).

These cases demonstrate three main points. One is that the *Second Report* sanctions the continued existence of newspaper/broadcast combinations that exert a predominant and unhealthy control over local sources of news and discussion of public issues. Another is that the supposed dangers to the public interest in separating newspaper and television ownerships advanced by the Commission do not exist in these markets in any significant degree, and probably are not significant in most markets. The final point is that the newly enunciated standards for designation of renewal hearings on concentration issues—when coupled with the policies of denying discovery and requiring *prima facie* proof at the pleading stage—frustrate exploration of the public interest factors involved.

In a word, *amici* believe that a brief examination of the *Second Report* as applied in three television markets will aid the Court in its evaluation of the Commission's action.

Wherefore, *amici* respectfully move for leave to file the within brief.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1977

No. 76-1471

(Consolidated with Nos. 76-1521, 76-1595, 76-1604, 76-1624 and 76-1685)

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Respondents.

BRIEF *AMICI CURIAE* OF THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE AMERICAN CIVIL LIBERTIES UNION

Preliminary

This brief is submitted in support of affirmance of the judgment of the United States Court of Appeals for the District of Columbia Circuit,[1] which reversed the decision of the Federal Communications Commission to grandfather

[1] *National Citizens Committee for Broadcasting* v. *FCC*, 555 F. 2d 938 (D.C. Cir. 1977).

virtually all existing co-located newspaper/broadcast combinations.[2] The Court is respectfully referred to the preceding Motion for Leave to File Brief *Amici Curiae* for a description of the interest of *amici*.

Summary of Argument

The *Second Report* was an attempt to establish a comprehensive policy for dealing with increasing monopolization of mass media in many American communities. A flood of petitions from the Justice Department and public groups had asked that television renewals be conditioned on separation of co-owned media. At first the Commission entertained such petitions.[3] Subsequently, it denied them pending completion of this rule-making. Finally, in its *Second Report,* the Commission concluded that the First Amendment policy of maximum diversity of program sources compelled it to ban future co-located newspaper/television combinations. However, the Commission grandfathered existing newspaper-television combinations except in "egregious" cases. The agency justified the exemption from its newly clarified policy on the basis of "competing policies . . . not previously considered" (555 F.2d at 963-65).

The Commission further insulated major market cross-owners by establishing a standard of pleading that made it virtually impossible for petitioners to deny to show in individual cases that a renewal hearing was required on concentration of control issues. The Second Report stated that

> . . . absent a showing of economic monopolization that might warrant actions under the Sherman Act, it would not be our view that such [concentration] arguments would raise valid issues necessitating the designation of renewal applications for hearing. 50 FCC 2d at 1088.

[2] *Second Report and Order,* Docket 18110, 50 FCC 2d 1046 (1975), *reconsideration,* 53 FCC 2d 589 (1975) (hereinafter "Second Report").

[3] See *e.g., Frontier Broadcasting Co.,* 21 FCC 2d 570 (1970); *Chronicle Broadcasting Co.,* 16 FCC 2d 882 (1969).

The Circuit Court found little record support for the Commission's invocation of competing policies. Nor did it find any rationality in the Commission's decision to abandon the First Amendment goal of maximum diversity of media voices in all markets on the basis of the unproved possibility of adverse consequences in some markets. Thus, the Circuit Court found the Commission's exemption of existing licensees was "arbitrary and capricious" and required reversal. 5 U.S.C. § 706(2)(A); 555 F.2d at 956.

The Circuit Court also faulted the Commission's *ad hoc* test for designation of renewal hearings on issues of media concentration. It found the Commission had unreasonably substituted an antitrust standard for the proper First Amendment/public interest test, and that its new standard "unreasonably curtails the interests of petitioners to deny" (555 F.2d at fn. 108).

The Commission's disposition of license renewal challenges in which *amici* have participated proves that the Court's evaluation of the *ad hoc* test is accurate. The "economic monopolization" standard does not take into account the First Amendment goal of maximum diversity of media viewpoints, which should be the Commission's paramount concern. Extreme cases of media concentration do not trigger *ad hoc* scrutiny.

These challenges also contrast the Commission's willingness to waive the cross-ownership rule at the request of licensees when special circumstances are shown, with its absolute refusal to examine special circumstances in waiver requests by public complainants.

Finally, *amici's* experience demonstrates that the *ad hoc* standard, coupled with the Commission's refusal to either

(a) place upon the licensee the burden of proving facts known only to it, or (b) give citizen petitioners the discovery tools necessary to establish the required facts, has made it virtually impossible for petitioners to deny to meet the Commission's pleading threshold. The *ad hoc* test thereby immunizes cross-owners from renewal challenges.

ARGUMENT

I

The *Second Report* finds that the First Amendment goal of diversity of media voices has primary significance. But it inconsistently perpetuates extreme media monopolies.

Section 309(a) of the Communications Act provides that Commission may not grant a broadcast license without making a finding that the grant will serve "the public interest, convenience and necessity." 47 U.S.C. § 309(a). Not the least among the public interest considerations it must evaluate on every renewal is the First Amendment policy of encouraging a maximum number of diverse sources of information.[4]

The Commission recognized the inextricable link between diversity and the public interest in the *Second Report:*

> If our democratic society is to function, *nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible.* This is not a reflection on the efforts of combination owners in diligently serving the public interest. Rather, it is a recognition that it is unrealistic to expect true diversity from a commonly owned station-

[4] *Scripps-Howard Television, Inc.* v. *FCC*, 189 F. 2d 677 (D.C. Cir. 1951); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

> newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run. 50 FCC 2d at 1079 (emphasis added).

This conclusion should have led the Commission to deny renewal of licenses of co-located newspaper/broadcast combinations (555 F. 2d 962). If the policy of promoting "the widest possible dissemination of information from diverse and antagonistic sources . . ." means anything, it means that the government should not entrust broadcast channels capable of wide dissemination of information to owners who already have the capacity to drown out any possible rival. However, the Commission ignored even its own assessment of First Amendment and public interest requirements and sanctioned renewal of licenses except in "egregious" cases where the "need is overwhelming and the evidence unambiguous" (50 FCC 2d at 1083). Its action is totally inconsistent with the First Amendment, the public interest and its own pronouncements (555 F. 2d at 962-63).

The Commission's illogic is compounded by its *ad hoc* standard for examining the effect of cross-ownership in the context of license renewal challenges. It refuses to examine cases of extreme concentration—and the dangers it poses to the diversity of information—absent "a showing of economic monopolization that might warrant actions under the Sherman Act . . ." (50 FCC 2d at 1088). This policy, as *amici* learned, leaves untouched some of the severest instances of media concentration in the country.

The *amici* have participated in renewal challenges against Newhouse Broadcasting Corporation's television stations in Syracuse, New York and Birmingham, Alabama (WSYR-

[5] *Associated Press* v. *United States*, 326 U.S. 1 at 20 (1945); See also *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390.

TV and WAPI-TV, respectively), and Cox Broadcasting Corporation's station in Atlanta, Georgia (WSB-TV).[6]

Newhouse is sole owner of the only newspapers of general circulation in Syracuse, *i.e.*, the morning, afternoon and Sunday newspapers. It has the most desirable television frequency and leading AM-FM radio stations, a satellite television station in Elmira, and ten cable franchises in and near the Syracuse SMSA. It is estimated that Newhouse obtains 81% of the local advertising revenues in the Syracuse SMSA and a larger share in the City itself.

WAPI is one of two VHF television stations in Birmingham. Newhouse also owns AM and FM radio stations in Birmingham, and a cable system in Anniston, Alabama. Newhouse owns the only morning and Sunday newspaper of general circulation, the *Birmingham News,* which has a joint operating agreement with the only evening paper, the *Post-Herald.* The terms of the joint operating agreement are secret.[7] However, it is known that the *News* acts as the exclusive agent of the *Post-Herald* for distribution and for the sale of advertising. The *Post-Herald* is printed in the *News* plant. Except for a separate editorial staff, the latter has no observable independent existence. It was alleged that Newhouse controls 80.6% of local advertising revenues in the Birmingham SMSA and that its market share is even higher in the City itself.

---

[6] In both 1972 and 1975, the Syracuse Coalition for the Free Flow of Information in the Broadcast Media challenged Newhouse's license to operate WSYR-TV, alleging undue concentration of control over local media. The Magic City Communications Coalition challenged Newhouse's licenses for WAPI-TV, Birmingham, on similar grounds in March, 1973. UCC provided legal and technical assistance to the Syracuse and Birmingham groups. In March, 1976 the Atlanta branch of the NAACP and the Georgia ACLU petitioned to deny Cox's Atlanta license renewals.

[7] A copy of the agreement is on file with the Department of Justice but is not publicly available. Petitioner's request to the Commission for production of the agreement was denied.

In Atlanta, Cox Broadcasting Corporation publishes the only two newspapers of general circulation. It owns WSB-TV, WSB-AM, a 50,000 watt "clear channel" station, and WSB-FM. It holds cable franchises for the City of Atlanta and its suburbs. It is alleged that Cox controls 83% of local advertising revenues in the Atlanta SMSA and an even higher share in the City itself.

It is believed that the share of local advertising revenues is a rough measure of the circulation of local news, and opinions on local issues. Various formulae have been used by scholars to measure concentration of control over the dissemination of news and opinion. One such measure indicates that 88% of Syracuse residents get most of their news from Newhouse. The comparable figures for Birmingham and Atlanta are 88% and 89%.[8]

In the nature of things it is difficult to demonstrate, particularly under First Amendment constraints, that Newhouse or Cox is less vigorous in pursuing the news, in exposing injustice and in airing controversy than television stations or newspapers in more competitive markets; but it is common experience that market dominance of this degree leads to a decline in competitive zeal. And, as will be shown below, there are substantial allegations of inferior performance by these cross-owners.[9]

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[8] These figures are taken from the Milwaukee "Most News From" Index which, along with the figures indicating advertising revenue shares, were before the Commission in its cross-ownership rulemaking docket.

[9] For example, a 1976 survey on local news on VHF stations in the St. Louis market found that Newhouse-owned KTVI-TV admitted it had a "lackluster" news operation with ratings that up to the beginning of 1975 could "always be counted on the fingers of one hand." *Broadcasting,* January 5, 1976, p. 89. The Department of Justice has alleged in a petition to deny against KTVI that Newhouse monopolizes the newspapers of general circulation in St. Louis. *Newhouse Broadcasting Corp. (KTVI-TV),* 62 FCC 2d 280 (1976).

When the media dominance enjoyed by Newhouse and Cox was brought to the Commission's attention by petitions to deny license renewal, including requests for waiver of the *Second Report,* it refused to conduct hearings, stating that citizen petitioners had failed to plead "economic monopolization that might warrant actions under the Sherman Act"—the *ad hoc* test of the *Second Report.*[10]

This Court has held that the Commission cannot, as it did in these cases, substitute antitrust laws for its own public interest standard. *United States* v. *RCA,* 358 U.S. 334 (1959). Very recently, the Commision itself seems to have recognized the deficiencies in its *ad hoc* standard. See fn. 108 of the Circuit Court's opinion; *WGAL-TV,* 39 RR 2d 457 (1976).

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[10] *Newhouse Broadcasting Corporation (WAPI-TV),* 59 FCC 2d 218 (1976), *reconsideration denied,* 61 FCC 2d 718 (1976), *appeal pending sub nom. Magic City Communications Coalition* v. *FCC,* D.C. Cir. Case No. 76-2088 (This appeal has been held in abeyance pending this Court's disposition of the instant proceeding); *Newhouse Broadcasting Corporation (WSYR-TV),* 51 FCC 2d 336 (1975), *appeal pending sub nom. Syracuse Coalition for the Free Flow of Information in the Broadcast Media* v. *FCC,* D.C. Cir. No. 75-1308. (The District of Columbia Circuit has, *sua sponte,* delayed the disposition of this appeal pending this Court's decision in the instant case). *Newhouse Broadcasting Corporation (WSYR-TV),* 62 FCC 2d 271 (1977), *reconsideration pending.* The petition against Cox is still pending at the Commission, but its refusal to designate a hearing for almost two years is an indication that it did not meet the pleading standards of the *ad hoc* test. *Compare WGAL-TV,* 39 RR 2d 457 (1976), where a hearing was designated on concentration issues.

II

The rationales for grandfathering existing cross-owners do not apply in Birmingham, Syracuse or Atlanta. Nevertheless, the Commission refused to consider waivers.

The Commission justified its exemption of existing cross-ownerships from the policy of diversity on the basis of competing policies not previously considered. These were:

(a) Disruption of the continuity of operation and proven superior service;[11]

(b) preservation of local ownership and involvement of ownership in management;

(c) local economic dislocations; and

(d) unfairness to existing licenses.[12]

Amici will not duplicate the analysis of the Circuit Court, which demonstrates that these rationales lack record support and cannot outweigh the long-standing policy of diversity of media ownership unless shown to exist in particular instances (555 F. 2d at 963-65). Our focus here is that the exemption of existing cross-owners is buttressed by a unique unwillingness to consider the facts of particular cases. A long series of decisions have held that, whatever its rules, the Commission must take a "hard look" at requests for exceptions and must consider special

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[11] This rationale—only one of many in the *Second Report*—has loomed ever-larger in the Commission's attempt to justify grandfathering. *Compare* 50 FCC 2d at 1973 with the Commission's Brief in this proceeding, pp. 23-26.

[12] This rationale, which is addressed as a separate point in the Commission's Brief (p. 27), was only an intimation in the *Second Report.*

circumstances.[13] When First Amendment policies are alleged in seeking waivers a particularly close examination is required.[14]

The Commission in this docket has stated that it will follow the "hard look" doctrine only to perpetuate cross-ownership and not to end them. It will grant waivers even to "egregious" monopolists who establish that unusual hardships or other circumstances in the particular market reverse the public interest presumptions on which the divestiture rule is based. It will not, however, entertain requests for waiver by members of the public under like circumstances. It therefore discriminates unfairly in favor of its licensees.[15]

Amici have sought precisely this kind of "hard look" in the Newhouse and Cox cases, alleging unusually high degrees of media concentration in important markets on one side of the scale, and, on the other, almost total absence of presumed injury to competing policies if corrective action is taken.

A. Continuity of Operation

Newhouse is not a "proven conscientious licensee" (FCC Br. p. 12). Its record of service to the public is poor, rather than "superior."[16] Newhouse has little need

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[13] *Federal Power Commission* v. *Texaco*, 377 U.S. 33 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *WAIT Radio* v. *FCC*, 418 F. 2d 1153 (D.C. Cir. 1969).

[14] *WAIT Radio* v. *FCC*, *supra*.

[15] *Office of Communication of United Church of Christ* v. *FCC*, 465 F. 2d 519 (D.C. Cir. 1972); *Hale* v. *FCC*, 425 F. 2d 556 (D.C. Cir. 1970).

[16] The petitions to deny claimed that Newhouse's programming was inadequate and unresponsive to the needs of minorities and women. On the basis of Newhouse's own EEO reports, it was

(footnote continued on following page)

to fear of offending groups which have almost nowhere else to turn for attention to their needs.

The Commission's 1974 Programming Record[17] showed that WSYR presented less local news, less public affairs and generally less local programming than the two weaker Syracuse stations. A report on stations in the top 50 ADI markets indicated that the two Newhouse stations (WAPI in Birmingham and KTVI in St. Louis) ranked 119th and 111th out of 138 in public affairs programming. Newhouse stations were also far below average in the employment of Blacks in upper job categories.[18] A 1974 survey by the National Black Media Coalition ranked Newhouse among the four worst group owners in the country. WAPI-TV ranked 6th worst in news and 7th worst in local programming.[19]

Cox is similarly no model of superior public service. During WSB-TV's 1970-73 license term, only 1.4% of its air time was devoted to local public affairs programming. *Amici* alleged that Cox had underrepresented Blacks in its local programming and had discriminated against women and minorities in its employment practices.

There is no reason to assume that a new licensee would be poorer than Newhouse or Cox. Certainly no such presumption should be indulged in the face of contrary allegations and denial of hearing.

(footnote continued from preceding page)

alleged that its stations employed insufficient numbers of women and minorities in the upper job categories. This allegation of employment discrimination was bolstered by an individual employee complaint.

[17] This is a public document compiled annually from reports filed by licensees on FCC Form 303-A.

[18] *Broadcasting in America, 1975, access Magazine*, December 1, 1975.

[19] National Black Media Coalition "TV Stations with Most/Least News, Public Affairs, Local Programming" (October 25, 1974).

B. Local Ownership and Integration of Ownership and Management

Samuel I. Newhouse resides on Park Avenue in New York City. Mr. Newhouse owns newspapers in Jersey City and Newark (N.J.); Syracuse, Jamaica and Staten Island (N.Y.); St. Louis (Mo.); Portland (Ore.); Harrisburg (Pa.); Birmingham, Huntsville and Mobile (Ala.); New Orleans (La.); Springfield (Mass.); Pasagoula (Miss.) and Cleveland (Ohio).[20] He also publishes at least five magazines in New York City and operates numerous broadcast stations, CATV systems and microwave facilities in various parts of the United States.

Cox controls newspapers in Dayton and Springfield (Ohio); Miami, Palm Beach and West Palm Beach (Fla.) and Atlanta (Ga.). It controls broadcast stations in Dayton, Miami, Atlanta, Charlotte (N.C.), San Francisco, Pittsburgh and Los Angeles. It controls cable systems in about 40 different communities.[21]

Neither Mr. Newhouse nor the Cox family participates directly in the management of WSYR, WAPI or WSB. There is no reason to think that they have experience with the unmet needs of the communities of license. As in most cross-ownership situations, they are absentee owners. A sale or exchange might reintroduce local owner-management.

C. Economic Dislocations

There is no evidence that a sale of these three stations would cause economic dislocation or excessive demand for equity capital.[22] A sufficient grace period before divesti-

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[20] *Television Factbook*, 1977, Services Volume p. 144-a.

[21] *Id.* at 144-a and 915-a.

[22] Commissioner Hooks noted that the Commission processed 1129 assignment and transfer applications in the year preceding the *Second Report*.

ture would insure that Newhouse and Cox could get a fair price for their stations. Exchanges with other cross-owners are feasible. In view of the length of time the licenses have been held, each owner would probably realize a staggering profit on his initial investment. Newhouse and Cox are well able to survive such a forced sale and even to finance a purchaser if necessary. Newhouse's consolidated revenues in 1971 were estimated at $450 million and its after-tax profits at $18 million.[23]

The impact of divestiture on programming should be no different than in the case of voluntary transfers, which are routinely approved by the Commission. Finally, private financial losses are not a relevant Commission concern (555 F. 2d 964-65).

D. Unfairness to Licensees

Even when a broadcaster has a record of superior service, the Commission cannot sacrifice the public interest in the name of "fairness" to the licensee. Every licensee has specifically waived any right to its frequency as against the regulatory power of the United States (47 U.S.C. § 304). One who chooses to apply for a public franchise must take the bitter with the sweet.[24] There can be no claim that either Newhouse or Cox would suffer any particular unfairness from divestiture, such as might occur if the stations had just "turned the corner" after years of unprofitable operation. Obviously, Newhouse and Cox have profited enormously from their stewardship of public channels. Clearly their newspaper monopolies will continue to be enormously profitable with or without the commonly-owned television stations.

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[23] Bishop, *The Rush to Chain Ownership*, Columbia Journalism Review, November/December, 1972, p. 14.

[24] *Citizens Committee to Save WEFM* v. *FCC*, 506 F. 2d 246, 271 (D.C. Cir. 1974) (Bazelon, C. J., concurring); Circuit Court opinion, 555 F. 2d at 964-65.

As evidenced by its disposition of the challenges in Birmingham and Syracuse, the Commission refuses to take a hard look at First Amendment and competing public interest considerations in particular renewal proceedings. It conclusively presumes that the First Amendment factors have inferior weight without regard for the actual facts.

III

The Commission's *ad hoc* test cannot reasonably be met. The test serves to immunize cross-owners from renewal challenges.

In applying its *ad hoc* standard, the Commission has required *prima facie* proof of a Sherman Act violation at the pleading stage; it has refused to follow established antitrust precedents and presumptions that would shift the burden of proof to the cross-owner. It has insisted that citizen petitioners come forward with evidence of specific abuses; but it has denied citizens access to the discovery necessary to uncover the relevant facts.[25] In short, the *ad hoc* standard leaves cross-owners in a better position vis-a-vis license renewal challenges than ever before.[26] They are effectively immunized from renewal challenges on concentration grounds.

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[25] Petitioners to deny are not entitled to discovery until the Commission designates a hearing. This leads to a procedural Catch 22 whereby petitioners are required to plead substantial and material facts, but are denied the tools by which to obtain them. See *Bilingual Bicultural Coalition on Mass Media* v. *FCC*, 492 F. 2d 656, 659 (D.C. Cir. 1974).

[26] See cases cited in note 3, *supra*. Even before the *Second Report*, if a petition to deny alleged actual violation of the antitrust laws a hearing would have been required to examine the licensee's character. The *ad hoc* standard, then, added no new bases for petitions against concentrated owners.

A. The Commission Refuses To Presume Monopolization or Harm Upon a Showing of Extreme Concentration.

The offense of monopolization under Section 2 of the Sherman Act has traditionally been defined to consist of monopoly power plus a certain deliberateness. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). In *Grinnell*, this Court defined market power as (1) the possession of monopoly power and (2) the wilful acquisition or maintenance of that power, *Id.* at 570-71. The Commission appears to have adopted this definition and uses "market power" as the quantum of proof required of petitioners to deny.[27]

However, in *Grinnell*, this Court also observed that "the existence of such [market] power may be inferred from the predominant share of the market." *Id.* at 571. Once the plaintiffs had established defendant's dominant (85%) market share in *Grinnell*, the burden of proof shifted to the defendant to *dis*prove monopoly power (236 F. Supp. 244, 257).

The Commission, on the other hand, regarded similar, unrefuted evidence of Newhouse's dominant market share in the Birmingham SMSA (80.6%) and Syracuse (81%) to be a "bald allegation" which failed to demonstrate market power.[28] It would not infer monopoly power or shift the burden to the cross-owner. Nor, ignoring other well-established antitrust precedent, would the Commission consider the cross-owner's dominance, coupled with its acquisitive practices, as a rebuttable presumption of intent to monopolize.[29] Instead, the Commission un-

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[27] See, *e.g.*, the Commission's decisions on the WAPI (59 FCC 2d 218) and WSYR (62 FCC 2d 271) renewal challenges.

[28] See, *e.g.*, 59 FCC 2d 218 at Par. 44; 62 FCC 2d 271 at Par. 24.

[29] *United States* v. *E. I. DuPont de Nemours*, 351 U.S. 377 (1956); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2nd Cir. 1945).

realistically and unfairly placed the burden on citizen petitioners, who lack discovery rights, to provide specific evidence of economic abuse, injury or deliberate monopolization. As noted by Judge Tamm:

> These procedural standards can be, in effect, a backhanded method of barring virtually all public intervenors from raising questions relating to concentration of control. *Hale* v. *FCC*, 425 F. 2d 556, 565 (D.C. Cir. 1970)

B. The Commission Has Placed An Unfair and Unreasonable Burden on Citizen Petitioners To Prove Monopolistic Abuses.

The most telling evidence of the Commission's attempt to immunize existing cross-owners through the application of its *ad hoc* test is its insistence on—and treatment of—evidence of specific monopolistic abuses.

Amici alleged that both Newhouse and Cox as a matter of deliberate corporate policy seek to combine competing media ownerships. Every Newhouse television station is combined with an AM/FM radio station and a virtual newspaper monopoly. Two out of five Cox television stations are combined with daily newspaper monopolies and AM and FM radio stations.

A common strategy of both licensees is a strenuous effort to head off competition from CATV systems. The most striking example of this is Cox, which succeeded in obtaining all but one major cable franchise in Atlanta and then merged with its only cable competitor. *Amici* alleged that Cox is now sitting on its franchises doing minimal construction and carrying minimum signals, including only one radio station, its own WSB. Clearly the owner of Atlanta's leading television and radio stations has no incentive to import competing television and radio signals or to carry cable programming which might divide its audience and revenues.

Newhouse has also fought to control the cable systems in Syracuse and Birmingham. *Amici* alleged that when the City of Syracuse transmitted a home rule message to the New York State Legislature seeking authority for a municipal cable system, Newhouse editorialized vigorously against it and succeeded in persuading the Syracuse legislators to have their bills recommitted. They alleged that in Birmingham Newhouse sought to use its control of an advantageous head-end site to get an exclusive cable franchise. Newhouse has not yet succeeded in getting either the Syracuse or Birmingham cable franchise, but it has delayed cable competition by others. Newhouse has succeeded in getting ten cable franchises within the WSYR Grade B contour and one within the WAPI Grade B contour. These franchises put it in a position to limit the carriage of signals which compete with its own.

Amici also alleged that both Newhouse and Cox used their editorial and news columns to advance their own corporate interests.

The charges against Newhouse were either dismissed out of hand as "patently lacking in specificity" (59 FCC 2d 218 at Par. 47), or were determined to be insubstantial simply because the licensee denied their existence.[30] The abuses contained in the Cox petition have failed to lead to an evidentiary hearing.

The Commission has yet to give citizen challengers a clue as to the kind of evidence required to show "market power." Nor has it ever granted citizens the right to conduct pre-designation discovery to develop more detailed evidence of "abuse", illogically citing their failure to dem-

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[30] *E.g., Id.* at Pars. 45-46; 62 FCC 2d 271 at Pars. 25-27. *See Black Broadcasting Coalition of Richmond* v. *FCC*, 556 F. 2d 59 (D.C. Cir. 1977).

onstrate how discovery would help to document their allegations! (59 FCC 2d 218 at Par. 3).

Furthermore, there is no constitutionally palatable means by which those suffering under the restraints of media concentration can satisfy the Commission that their injuries are real and not "abstract". Attempts to establish that a cross-owner has limited the diversity of news and opinion or that improper influences have affected its editorial and news policies would inevitably involve the Commission in the scrutiny of program content and in sanctions for the manner in which news was treated.[31] Clearly structural market control is a "less restrictive alternative" than the Commission's specific abuse approach.[32]

As noted, the Commission has made it virtually impossible for petitioners to meet the severe Sherman Act "required conduct" threshold. Predominant market share raises no presumption of monopolization. No discovery tools are available to help document allegations of abuse. Affidavits regarding abuses are ignored or found to be unproved on the basis of confusion between allegations and testimonial evidence.[33]

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[31] Such governmental intrusions would raise serious threats to First Amendment protections. See *Columbia Broadcasting Co., Inc.* v. *Democratic National Committee*, 412 U.S. 94, 110-111 (1973).

[32] *Brandywine-Main Line Radio* v. *FCC*, 473 F. 2d 16 (D.C. Cir. 1972) (dissenting opinion of Bazelon, C.J. at fn. 46).

[33] *Cf. Office of Communication of the United Church of Christ* v. *FCC*, 425 F. 2d 543 at 548 (D.C. Cir. 1969).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, 76-1685

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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OPPOSITION TO MOTION OF THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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The National Association of Broadcasters ("NAB"), petitioner in No. 76-1595, hereby opposes the motion of the Office of Communication of the United Church of Christ ("UCC"), the National Association for the Advancement of Colored People ("NAACP") and

the American Civil Liberties Union ("ACLU") for leave to file a brief *amici curiae.*

The NAB submits that movants should be denied leave to file a brief *amici curiae* because they have failed to meet the standards of Rule 42 of this Court. The NAB's refusal to consent to the filing of a brief by the movants has now been reinforced by the contents of their proffered brief, which improperly relies on matters outside the record.

The UCC, NAACP and ACLU allege that the *Second Report and Order* in Docket 18110[1] has been improperly applied by the FCC in three license renewal proceedings involving WSYR-TV, Syracuse, New York;[2] WAPI-TV, Birmingham, Alabama;[3] and WSB-TV, Atlanta, Georgia.[4] Relying on certain alleged facts in those three proceedings—none of which are before this Court—movants claim that the FCC should have granted relief to the petitioners therein. The asserted "facts" include allegations concerning media concentration in the three markets involved, monopolistic intent of the licensees of the three stations, and the quality of their stations' programming and employment practices. The expressed purpose of

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[1] 50 F.C.C.2d 1046, reconsideration, 53 F.C.C.2d 589 (1975).

[2] Newhouse Broadcasting Corp., 51 F.C.C.2d 336 (1975), *appeal pending sub nom.* Syracuse Coalition for the Free Flow of Information in the Broadcast Media v. FCC, D.C. Cir. No. 75-1308; Newhouse Broadcasting Corp., 62 F.C.C.2d 271 (1977), *reconsideration pending.*

[3] Newhouse Broadcasting Corp., 59 F.C.C.2d 218 (1976), *reconsideration denied,* 61 F.C.C.2d 718 (1976), *appeal pending sub nom.* Magic City Communications Coalition v. FCC, D.C. Cir. No. 76-2088.

[4] Petition to deny pending before FCC.

the movants' *amici* brief is to enable this Court to consider the facts in these other proceedings in its evaluation of the issues in the consolidated proceedings before the Court.

The NAB submits that the objective of the *amici* brief is improper and prejudicial. It is an elementary and long-established principle that the Supreme Court will not consider matters which are outside the record. *E.g., New Haven Inclusion Cases,* 399 U.S. 392, 450 n.66 (1970); *Thomson* v. *Gaskill,* 315 U.S. 442, 446 (1942); *Meeker & Co.* v. *Lehigh Valley R.R.,* 236 U.S. 412, 431 (1915); *Smith Middlings Purifier Co.* v. *McGroarty,* 136 U.S. 237, 240 (1890); *Bechtel* v. *United States,* 101 U.S. 597, 600 (1879); *Kerr* v. *Clampitt,* 95 U.S. 188, 189-90 (1877); *Holmes* v. *Trout,* 32 U.S. (7 Pet.) 171, 210 (1833); *Thornton* v. *Carson,* 11 U.S. (7 Cranch) 596, 601 (1813). That principle is particularly applicable here since movants refer to the records in proceedings to which the NAB is not a party and which are still in the process of adjudication. Thus, were the motion granted, the NAB would be unable adequately to respond to movants' factual allegations, even if it were otherwise procedurally appropriate to do so.

The FCC developed an extensive record in Docket No. 18110. It is that record which is now before this Court. The records of the pending proceedings to which movants refer, and the asserted facts from those records on which they rely, are not before the Court, and should therefore not be considered in resolving the present consolidated proceedings. Since the sole purpose of the *amici curiae* brief of UCC, NAACP and ACLU is to place before this Court matters which

are outside the record, the NAB respectfully submits that movants' motion for leave to file that brief should be denied.

Respectfully submitted,

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